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CANONICAL WITNESSES

IN VIEW of the importance of the subject it may not come amiss to add a few observations to the excellent discussions on the examination of witnesses, by Harrington,[1] and on the evaluation of their testimony in matrimonial cases, by Quinn.[2]

Ordinarily, under the rules of Canon Law, sufficient proof is present for the tribunal to render a decision if two or three persons who are beyond challenge and who are consistent and firmly accordant with themselves testify under oath as to some thing or fact of which they themselves have knowledge. This general rule, however, is limited by the proviso that the judge may, because of the very great seriousness of the business at hand, or because of certain indications which raise some doubt as to the truth of the thing asserted, demand more abundant proof if he thinks it necessary under the circumstances.[3]

Sufficient proof may also be had from a *testis qualificatus* who deposes concerning things which were done *ex officio,* e.g., in the performance of his parochial or notarial duties; though normally the testimony of one witness would not afford, by itself, sufficient proof.[4]

[1] Harrington, "Analytic Comparison of Trials under Canon Law and Civil Law with Specific Reference to the Examination of Witnesses," *The Jurist,* Washington, D. C., Vol. XIV, No. 3, pp. 286-317; Vol. XIV, No. 4, pp. 410-452.

[2] Quinn, "Evaluation of Evidence in Matrimonial Cases," *The Jurist,* Washington, D. C., Vol. XVI, No. 4, pp. 403-416.

[3] Can. 1791, § 2.

[4] Can. 1791, § 1.

The sufficiency of the proof can be affected adversely by objections against the person of the witness. It can likewise be adversely affected by objections against the testimony which the witness gives. Even if there is no occasion for challenge to the person of the witness or to his testimony there may be a further problem as to the amount of weight which the tribunal should give to what has been said.

With regard to the person of the witness, the general rule is that all persons can be witnesses before a Church tribunal unless they are expressly rejected by law, completely or partially.[5] There are several reasons why the judge may have to exclude witnesses *ex officio,* if he is clearly aware that they are prohibited from giving testimony,[6] unless he finds it expedient, and so decrees, to hear those classed as " not fit " and " suspect "; though in this latter case their testimony will have value only as an indication and as a subsidiary proof, and generally they will not be heard under oath.[7]

The judge may know of some of these reasons because the fact is notorious,[8] e.g., that the witness is a public and serious enemy of one of the parties. The matter may also be brought to the attention of the judge by the character testimonial which he seeks *ex officio* concerning the witness,[9] though this character testimonial seeks primarily information as to the religious character, the probity and credibility of the witness, and may not bring to light all the possible objections against the person of the witness. The objection may also be raised and substantiated by the other party to the case.[10]

[5] Can. 1756; Instruction, S. C. Sacr., *Provida,* Aug. 15, 1936, *AAS,* XXVIII, p. 313 ff., Art. 118.

[6] Can. 1764, § 1.

[7] Can. 1758.

[8] Can. 1747, 1°.

[9] Instruction, *Provida,* Art. 138.

[10] Can. 1764, § 2.

If the fact of the witness' disqualification is not notorious, and if it is not mentioned in the character testimonial, or is not raised by the other party, particularly when the other party takes no interest in the case and leaves the entire burden of opposing the petition to the *Defensor Vinculi,* who may not be in a position to know of the lack of qualification on the part of the witness before he appears, it may be that only in the course of the interrogation will it become apparent that the witness should be rejected and his testimony disregarded, completely or partially.

Certain defects in the witness will become apparent from the answers which he gives to the general questions put to all witnesses to enable the tribunal to understand their capacity to act as witnesses and to evaluate their testimony. These questions enlighten the tribunal as to the general circumstances surrounding the particular witness, his name and parentage, his age, his religious affiliation, his state in life, his domicile, and his connection with the parties in the case.[11]

The fact, therefore, that the witness is " not fit," because he has not yet attained the age of puberty, and should be rejected, will appear from the answers to the general questions. Should the judge think that even a witness of tender years can contribute some indications of the truth of the matter or that he can offer some subsidiary proof he can, of course, decree that even such a witness be heard.[12]

Whether the witness is weak of mind may not appear immediately, especially if this is not something notorious, or is not raised by the character testimonial, or is not raised by the other party. In such a situation the tribunal may go through several of the questions in the questionnaire submitted by the *Defensor Vinculi* before becoming aware from the answers of the actual lack of mental capacity on the part of the witness. Since such a witness is normally to be rejected as " not fit " the tribunal can either suspend the questioning when the lack of

[11] Can. 1774.

[12] Can. 1757, § 1; 1758; Instruction, *Provida,* Art. 119, § 1; 120.

mental capacity becomes apparent, or can decree that the questioning continue to obtain the answers of such a witness for what they may be worth as indications of the truth of the matter or as subsidiary proof to the extent that any is afforded by the answers of such a person.[13]

The fact that the witness is a person under excommunication, or is a perjurer, or is infamous, and has been so declared or condemned by sentence, may likewise not be known to the tribunal, especially if such a sentence issued from another tribunal in a distant part of the country or of the world, and if the fact is not raised in the character testimonial or by objection of the other party. Such a witness is classed as "suspect," and should be rejected or heard only for such indications as he can give as to the truth of the matter or for subsidiary proof, and preferably not under oath.[14]

Similarly, the tribunal might, especially if the character testimonial is delayed, interrogate a witness who is later discovered to be considered of such abject morals as not to be worthy of credence. Such a witness, too, should be rejected, or heard only for the indication of the truth of the matter which he can give, and for subsidiary proof, and, preferably, not under oath.[15]

While the Canon Law excludes certain persons from the function of witness when they have been convicted of certain crimes and when they are of abject morals, it does not expressly mention persons who have been convicted of offenses against the criminal laws of the various nations. Certainly, however, a person who has been guilty of crimes against the criminal laws of the state may be considered untrustworthy as a witness in a canonical tribunal. For instance, one who has been found guilty of larceny by fraud or trick or similar crimes might be considered as deserving less consideration than an honest and upright man. Not all crimes, of course, carry with

[13] Can. 1757, § 1; 1758; Instruction, *Provida,* Art. 119, § 1; 120.

[14] Can. 1757, § 2, 1°; 1758; Instruction, *Provida,* Art. 119, § 2, 1°; 120.

[15] Can. 1757, § 2, 2°; 1758; Instruction, *Provida,* Art. 119, § 2, 2°; 120.

them the taint of untrustworthiness, for some may involve sudden outbrusts of passion and similar faults which would not necessarily derogate from the witness' general trustworthiness; but certain crimes indicate a general tendency to disregard the truth. Such criminals, it would seem, could at least be considered as "suspect" because of being of "abject morals."

Again, a witness may be a public and serious enemy of one of the parties, without the fact being so notorious that the tribunal can take judicial notice thereof. Further, this may or may not appear from the character testimonial, and the adverse party may not raise the point, if he is not actively contesting the petition. Such an attitude would cause the witness to be rejected as "suspect," or to be heard only with limitations, were it known to the tribunal.[16]

In this connection it might also be observed that it sometimes happens that a person who appears for the petitioner is a close friend of that party and is at the same time most hostile to the other party, even without being a "public and serious enemy" of that person. It may be that only in the course of the testimony given will it become apparent to the tribunal that the witness is thus hostile, if the respondent does not bother to take an active part in the case. The *Defensor Vinculi* can hardly be expected to know from reading the list of proposed witnesses what attitude they have toward either of the parties, and, yet, this hostile attitude may color the witness' testimony substantially, and should, therefore, be taken into account when the judges come to weigh the testimony offered in the case.

The answers to the general questions will serve also to show certain other points with regard to the persons before the tribunal. They will, e.g., reveal whether the person before the tribunal is one of the parties in the case or is taking the place of one of the parties, like the guardian in the case of his ward, the superior or administrator in the case of his community or

[16] Can. 1757, § 2, 3°; 1758; Instruction, *Provida*, Art. 119, § 2, 3°; 120.

pious cause, in whose name he appears in court, the judge or his assistants, the lawyer and the others who assist or have assisted the parties in the same case. It will be easy, then, to see that the person is to be rejected as incapable of being a witness.[17]

The rejection of these people, especially of the parties, as witnesses does not mean, of course, that their statements are of no value, for they may be very valuable in outlining the position taken by each party and in indicating sources of proof for the case. What is meant by rejection is simply that they are not to be grouped with the witnesses when one is considering whether or not there is sufficient proof in the case to substantiate the position taken by one or the other of the parties.

From those same general answers it will appear whether the witness is a priest who is incapable of being a witness as to all things which have become known to him from sacramental confession, even if he has been released from the bond of the seal. Indeed, what he has heard from anyone and in any way on the occasion of confession can not be accepted by the tribunal even as an indication of the truth.[18] Hence no question will arise as to weight to be given to such testimony, which is not even allowed to be taken.

From the general answers it will appear whether the person before the tribunal is a consort of a party to the case In marriage cases, of course, wherein the consorts are the parties, this fact would put them in the group mentioned in Canon 1757, § 3, 1°. Outside of marriage cases a consort of one of the parties would not be capable of being a witness, unless the case affected the civil or religious status of a person and the information could not otherwise be obtained and the public good required that it be obtained.[19]

[17] Can. 1757, § 3, 1°; Instruction, *Provida,* Art. 119, § 3, 1°.

[18] Can. 1757, § 3, 2°; Instruction, *Provida,* Art. 119, § 3, 2°.

[19] Can. 1757, § 3, 3°; Instruction, *Provida,* Art. 119, § 3, 3°.

Likewise from the answers to the general questions the tribunal will discover whether the witness is one who would ordinarily not be considered capable of acting as a witness because of being related to a party by blood or marriage, but is allowed so to act in cases regarding the civil or religious status of a person, such as is a marriage case.[20]

Even if the witness cannot be challenged on the various grounds thus far discussed it may be that the testimony which he gives is subject to challenge. After the testimony has been published it is possible to challenge the testimony (1) as to the method of questioning, i.e. when the rules of law governing the examination of witnesses have not been observed; (2) as to falsehood in the testimony; (3) as to variations in the testimony; (4) as to contradictions therein; (5) as to obscurity of the statements; (6) as to lack of knowledge on the part of the witness; and (7) as to other things.[21]

Any or all of these grounds for challenge to the testimony may affect the weight which the tribunal will be able to give thereto. Care, however, in the interrogation, not to violate the rules of law which govern it, will eliminate that reason for challenge. Likewise the tribunal can, by skillful questioning, eliminate many of the other grounds for challenge to the testimony. In this way it can meet the difficulty presented by the rule that after the publication of the testimony the witnesses already heard are not to be interrogated on the same points and new witnesses are not to be admitted except cautiously and for a serious reason in cases which never become *res judicata,* and for a most serious reason in others.[22] Prior, however, to the publication of the acts or testimonies the witnesses who have been heard can again be questioned, if the judge considers this necessary or useful, provided all danger of collusion or corruption is removed.[23] This maneuver may

[20] Can. 1757, § 3, 3°; Instruction, *Provida,* Art. 122.

[21] Can. 1783, 2°.

[22] Can. 1786; Instruction, *Provida,* Art. 135.

[23] Can. 1781; Instruction, *Provida,* Art. 107.

help to eliminate some of the grounds for challenge to the testimony, e.g. variations, contradictions, obscurity, etc.

Passing for the moment the question of violation of the rules of law governing the examination of witnesses, we might consider the challenge to the testimony on the grounds of falsehood. While there are, no doubt, cases of deliberate falsehood we can start with the assumption that false testimony is more frequently unintentional than deliberate. Indeed, it is harder to uncover the error which is unintentional than that which is deliberate. In the latter case the witness is conscious of falsifying the statements which he is making and is bound to feel a certain tension and worry lest he be found out. This attitude will communicate itself in little ways to the tribunal which will be able, through skillful interrogation, to bring out the fact that the witness is deliberately falsifying his testimony.

In the case of unintentional faleshood, however, the witness does not even advert to the possibility that he may be in error and goes blithely on with his story. Fallibility is a human trait, and even men of trained minds experience difficulty remembering what has happened even in the recent past. For example, were the judges to discuss among themselves what a previous witness had testified they might find themselves in disagreement unless they had the record kept by the notary at the time the testimony was given to refresh their memories. Unintentionally false testimony, then, is to be ascribed to our human limitations. If the court considers well these limitations and develops the extent to which they may have influenced the testimony of a given witness it will be able to expose the falsity of the testimony.

One of the most important limitations to which men, and, consequently, witnesses are subject is that affecting their capacity to observe and their capacity to remember. Some people, as we well know, are of the introspective type who seem always turned in upon themselves and scarcely aware of what goes on. These are the people who meet friends on the street

and seem hardly to recognize them. They are so occupied with their own thoughts that what their eyes and ears transmit seems not to register in the brain. Such a person might very well be present in the church at the wedding and really not notice a thing which occurred, even if the bride was weeping copiously. Called at a later date as a witness such a person may feel obliged to answer and then may attempt to reconstruct the scene, not as it is actually recollected, which it is not, but as the witness judges it should be recollected, since he was, apparently, present, and supposedly saw and heard what occurred.

Another type of person is the extrovert, all eyes and ears. He is constantly attentive to all that his senses are transmitting to him and he is carefully storing up in his memory all the impressions he receives. Such a person would notice whether there was even a slight hesitation on the part of the groom in responding, " I will." In between these two extremes there are, of course, all sorts of gradations. The judges should be alert to note during the examination of what type the witness appears to be in order to determine what weight to give to his testimony.

Memories of witnesses are likewise subject to wide variation and this, too, may lead to unintentional falsehood. Some persons are endowed with phenomenal memories which retain in utmost clarity every least impression and they can reconstruct the events which occurred with the greatest detail. Others are able to remember dates with the greatest exactness, and very little else, e.g., what exactly happened on that date. Still others can remember exactly where each member of the wedding party stood at each moment of the day, but not what they said. Others can remember every word that was said, but not whether it was said at home, at church, or at the reception following the wedding. Allowance must, obviously, be made for all these human frailties of the witnesses when the judges come to weigh the testimony which they give. Contradictions and variations may be explained away on this ground, in some cases.

Another thing which affects the impression of an event upon a witness is the closeness of his participation in the event in question. A person who was a bridesmaid or a best man would be more likely to receive a vivid impression of the events which occurred than would a person who was merely present in church as one of the invited guests. The person to whom one of the parties went for counsel and advice would be more likely to remember the attitude of the party than would even one of the ushers who was busy seating people in the church.

The physical position of the witness in relation to what took place would also affect the weight to be given to his testimony. If the person sat far back in the church he would be less well able to see and hear what occurred than if he were in one of the front pews.

Other human frailties are also to be remembered in the weighing of testimony, even that of an eye or ear witness. If self-preservation is the first law of nature, self-justification comes quickly after it. Children in a dispute seek to justify their actions and to put the blame on the other. How many times the same thing occurs among adults! How many times, when the case comes before the court, do not the parties to the marriage try to put all the blame on the other and to justify themselves completely? Similarly, their relatives and friends, testifying for them, seek to uphold them and to run down, though ever so gallantly, the other party. Sometimes, too, a particular witness may be anxious to justify his course of action with regard to the parties, e.g., in not dissuading them from the marriage.

Further, pride, greed, sympathy and animosity, all have their tendency to influence the reactions, impressions, and recollections of witnesses, and thus to distort to some degree the facts to which they testify.

All of these things, then, can influence the weight to be given to their testimony, quite apart from the cases of deliberate fraud and falsehood on the part of witnesses. It is for this reason that the Code so wisely directs that the judge shall

find out from the witness whence and in what way he knows what he asserts.[24]

Another problem which may arise, which was adverted to in discussing the introspective type of witness, is that of separating the recollection of the witness from his judgment. This is especially liable to happen in cases brought to the court some years after the events have occurred, as so often happens in marriage cases. A person who gives his testimony a short while after an event has occurred will likely have a clear and distinct recollection of it, subject to what was said before as to his capacity to observe and remember. When, however, a year, or perhaps many years have elapsed his subsequent experiences and impressions will have crowded his recollections of the event pretty well back into his memory. It may be, too, that he had no particular occasion for keeping the facts in his mind. In consequence, when the witness is called upon to testify as to what actually happened on a certain occasion many years ago he may find that he does not have anything, even a diary, to refresh his recollection. In such a case, wishing to be as helpful as he can he is liable to rely, not on his actual recollection of the events, but on his judgment as to what probably occurred. The end result is a combination of recollection and judgment and it would be hard for the witness himself to say which is the actual recollection and which is the judgment as to what most likely took place, or should have taken place. The tribunal will, therefore, want to determine more closely without seeming to be too busybodyish, just what the actual recollection of the witness is, in order to give it the proper weight.

Still another factor which may affect the testimony of the witness are the physical defects by which he may be afflicted. The tribunal will not desire to embarrass the witness, of course, but it should consider whether his poor vision, his color

[24] Can. 1774; Instruction, *Provida,* Art. 100.

blindness, or his defective hearing may have a bearing on his observation of what occurred, and consequently on his testimony.

At times, too, it may be that the witness' experience will be a factor to be considered in weighing the testimony given by that witness. If a witness is testifying, e.g., as to the nervousness and tenseness of the party before the ceremony or during it, it may be important for the court to learn just how capable the witness is of observing such phenomena and of estimating degrees of nervousness and tenseness, i.e., how often the witness has seen persons under circumstances in which they were tense to the point where their capacity for acting, e.g., making a contract, might be affected.

Besides being true the testimony should be consistent.[25] Even during the hearing of the witness the tribunal may become aware from the testimony being given that the witness is varying his story, is uncertain about things he states, or wavers. Further, the tribunal may know from the testimony of another witness or of the parties that the witness in question has made statements previous to the trial which are inconsistent with what the witness is now testifying under oath. There may even be documents in evidence subscribed by the witness which are inconsistent with the present testimony. It would be well, then, for the tribunal, even as the examination of the witness proceeds, to seek information to clarify this inconsistency.

Thus, in a *ratum non consummatum* case a witness who testified that the couple had been forced to separate immediately after the ceremony because the groom was summoned to join his regiment which was departing for over-seas duty might be asked to explain how that is possible when the records of a local hotel or boarding-house show that the couple spent two nights in that hotel or boarding-house after the ceremony.

[25] Can. 1789, 3°.

Sometimes the inexorable logic of facts will cause the witness to vacillate. This is especially true if the inherent improbability of his story is made to appear from his admission of other facts which are inconsistent with what he is now saying, or if he admits that there were surrounding circumstances which would have interfered with his ability to observe or record the facts accurately, or if he admits that he himself has followed a course of conduct which makes his story seem inherently improbable, e.g., by not reacting as an outraged person would normally react.

It may be that some portions of the testimony given by the witness are obscure, and thus subject to challenge when the testimony is published. It would seem, however, that this obscurity would become apparent to the tribunal in the course of the examination of the witness, so that even before the witness retires from the room the judges will be able to ask further questions to clarify the matter. Certainly, when the answers given to the questions asked are read back to the witness by the notary the judges will be able to ask questions which will serve to clarify the statements which the witness has made. Thus, the tribunal will be able in great measure to obviate the challenge which might otherwise be made on the ground of obscurity.[26]

Another ground for challenge to the testimony offered is lack of knowledge on the part of the witness. Conversely, a witness who testifies of his own knowledge to some thing or fact is to be given a great deal of weight.[27] Quite apart from the problem raised by the mixture of recollection and judgment in the testimony given by a witness who testifies some time after the events occurred, is the problem raised by the mixture of knowledge and hearsay in the testimony offered. When testimony is given a long time after the events occurred it is quite possible that what the witness says will be a mixture of his own direct knowledge of the thing or fact with some

[26] Can. 1783, 2°.

[27] Can. 1783, 2°; 1791, § 2.

hearsay which he has picked up from conversations with others about the case, even long before it was presented to the tribunal for adjudication. At times not even the witness will be able to say exactly just how much of his testimony comes from his own direct knowledge and how much from what he has learned about the case from conversations with other people. Still, the tribunal is expected to weigh the testimony according to whether the witness testifies from his own direct knowledge or from his belief, from rumor, or from hearsay. While hearsay is not entirely rejected,[28] it is important for the tribunal to know what part is testimony from direct knowledge and what part is testimony from hearsay so that it can evaluate properly the testimony of the particular witness. It will be necessary, therefore, to attempt in the course of the questioning to assist the witness in distinguishing between what he saw and heard and experienced himself and what he learned from conversation with others about the case and the parties thereto.

Under the final, catch-all, clause regarding objections to the testimony several suggestions might be made. For instance, it may be, in some case, that the witness though not closely related to or connected with one of the parties nevertheless has an interest similar to that of the party. A witness, e.g., testifying for a party to a marriage case may have in mind the bringing of a similar case if this one turns out favorably to the party involved. Despite all desires to be objective in presenting the facts regarding the marriage currently in question, the witness may still not be able to abstract entirely from what that witness would like to have appear on the record were the witness to be the party in another case. Such subjective desires are not easy to see, but if there is suspicion that they may exist it would be well for the tribunal to ascertain in the course of the examination whether there is any such thing influencing the testimony which is being given.

[28] Martin, "Hearsay at Common Law and at Canon Law," *The Jurist*, Washington, D. C., Vol. XI, No. 1, pp. 58-76; Vol. XI, No. 2, pp. 226-250.

Friendship with the parties, which should appear in the answers to the general questions, may influence to some extent the testimony which is being given, for friends are inclined to put things in the light most favorable to their friends. Friendship may appear, among other things, from the fact that the party and the witness belong to the same club, the same political organization, the same golf or other athletic or social group. This does not necessarily color the testimony, but it is something which will be considered in weighing the testimony.[29]

Sometimes something stronger than friendship appears. It may be that the witness, though ostensibly a mere friend of the party, is involved in some way with the party or the relatives of that party because of employment, or prospects of employment, or because of loans obtained from the party or the relatives of the party. This may not appear from the answers to the general questions, yet it may put the witness in a position not to want to say anything which might not be helpful to the party. If the tribunal has any reason to feel that this situation may be verified with regard to a particular witness it will try to develop the true state of affairs by further questioning of the witness as to his relations with the party or with relatives of the party.

If the witness is one who is intemperate in the use of alcohol or drugs it is possible that his recollection of the events in question may not be absolutely reliable. He may have been in perfect possession of his faculties at the time he witnessed the events, but the intervening affliction may now make his memory somewhat less reliable. This affliction may not appear while the witness is actually being examined, though drug addiction would be harder to mask, but it could appear from the character testimonial for the witness, or from other sources.

[29] Cf., in this regard, rule no. 87, in the Decree and Rules of Procedure for Cases on Non-consummation of Marriage, S. C. Sacr., *Doctrina Catholica,* May 7, 1923, *AAS,* Vol. 15, pp. 389 ff.

The possibilities of objections to the testimony on the ground that the rules of law have been neglected in the course of the questioning of the witness are in direct proportion to the number of questions asked. It is for this reason that in civil courts the lawyers prefer to have the witnesses on direct examination give what is known as "narrative" testimony. This is testimony in which the witness tells in his own words what happened, where and when, and his connection with the events. It eliminates possible objections, after the testimony is published, on the grounds that the tribunal asked questions which did not conform to the rules of law. It has the further advantage of presenting itself as something which flows freely from the witness in his own words and according to his own manner of speaking, and it carries with it the impression of trustworthiness.

Short, choppy, testimony, on the other hand, often creates the impression that it is being reluctantly extracted from an unwilling witness who is being coached and prodded by the court. There is really no need for the judge to interrupt with *ex officio* questions while the witness is recounting his story, except to keep the witness within the bounds of what is acceptable and relevant evidence. As in the confessional, the judge can note the points on which he desires further clarification and can ask the witness, when he has stated all that he can recollect about the matter, about these points. In fact, such questions, at such time, may stimulate the witness' memory once more so that he can continue his narrative in further detail.

Questions calling for short answers are, of course, not to be neglected, if they will serve to orient the witness, to fix the time and place of the occurrence, and to introduce subjects preliminary to the narrative testimony.

The witness may, however, in the course of the narrative testimony wander form the point, omit necessary facts, misstate or exaggerate. The greatest danger is that the witness will ramble on into irrelevant and unnecessary matters. The

judge should, therefore, be ready to interrupt the narrative, whenever necessary, with a question that will bring the witness back to the point, remind him of something he omitted, qualify a statement that was too broad, amplify a statement that was too narrow, clarify an ambiguity or emphasize an important point.

This narrative testimony can be obtained, then, by letting the witness tell in his own words the "what, when, where" aspects of the events which he recounts. He can then show his participation in, or his relation to, the facts in issue. He can tell what occurred, when it occurred, and where it occurred, as he saw, heard or otherwise sensed the occurrence. The questions can be, e.g., "What did you say to him?" "What did he say to you?"

The questions must of course, not be "leading," [30] i.e. such as to suggest the answer desired, for a friendly witness, or one who is impressed by the person of the judge and anxious to please him, will try to furnish the answer implicit in the question. The civil courts, however, allow "leading" questions when the witness is definitely hostile to the party involved. Such a witness is by hypothesis unfriendly and will hardly accept the suggestions willingly. Because of the witness' hostility his answers to non-leading questions may frequently be evasive or incomplete. He is reluctant to tell that which may be helpful to the party toward whom he is hostile. Frequently the only way to pin the witness down and get all the facts in such a situation is to ask a "leading" question. One might wonder whether such a tactic might not be permitted likewise in the case of a witness who does not think the Church has any right to "pry," as he thinks, into the matters about which he is being asked. Being unfriendly to the Church, such a witness is not likely to accept willingly the suggestion contained in the question, and it may be about the only way to pin him down and get at the truth.

[30] Can. 1775, ". . . non suggerentes responsionem . . . ."

The questions are likewise not to be "double," [31] for in that case one could not tell which question was to be answered, or which one the witness actually did answer. Similarly, the questions to the average witness are not to be speculative, for only experts are permitted to speculate about what might happen or might have happened, given certain circumstances, and the same is true with regard to hypothetical questions. Furthermore the question should not be argumentative, nor should it assume a state of facts not in evidence. The witness is there to tell what occurred and when and where it occurred. Likewise the questions should not ask the witness to draw conclusions, either of law or of fact, for this is the province of the tribunal. Finally, the questions are not to be captious, tricky, or offensive.[32]

There are certain special types of witnesses who need special handling when they appear before the tribunal. For instance, it may happen on occasion that the tribunal is confronted with a witness who is something of a "character." He should be given some rein, so that his testimony has the naturalness and spontaneity which is important to credibility. He should not, however, be permitted to ramble at will in the telling of his story, and he should be gently reminded, when necessary, to give direct answers. In other words, he should be kept under control of the tribunal. Still, the judges will have to adapt themselves to some extent to the witness rather than harness the witness to the more orthodox type of questioning if they are to get the information which this type of witness is able to furnish.

Another type of witness which calls for special handling is the "talkative" witness. This bane of the notary's existence seems never to be able to come to the point of the question without wandering around over a great deal of territory. Still, to cut off the answers abruptly and to prod

[31] Can. 1775, ". . . non plura simul complectentes . . . ."

[32] Can. 1775.

the witness for a direct answer may cause such a witness to lose the recollection to which the wandering would eventually lead. Some people simply are not able to focus their recollections until they have explored all related matters. To get the information which the witness is actually able to give the tribunal may have to listen patiently for some time until the point desired is finally developed. Even so, one effective way to impress upon the witness the need to direct himself to the point of the question is to ask him, when he has wandered time and again, "What question are you answering now?"

Another type of witness which creates a special problem is the "evasive" witness. While the talkative witness offends by too effusive an answer, the evasive witness offends by indirectness and avoidance. The tribunal needs to be on guard not to be thrown off the track by an evasive answer to a question. If the question is repeated in the same language in a calm tone the witness must either answer it, or, if he continues to evade the answer his insincerity will become apparent, so that his testimony can be properly weighed, when the judges come to consider the proofs in the case. This course of action is better than simply to order the witness to answer the question, for in the latter case the witness will answer the question and his evasiveness will not appear as clearly on the record as if he is allowed to give an evasive answer and then is asked the same question again. If he tries to evade the second time it will be much clearer what sort of a witness he is and how much weight is to be given to his testimony, especially when the tribunal of appeal comes to read the record.

Still another type of witness is the "contentious" or "partisan" witness. Not infrequently expert witnesses are of this type, more concerned as advocates with establishing their points than as witnesses concerned only with answering questions as to what was actually discovered in the examination.

In dealing with such a "contentious" witness the tribunal may find it necessary to frame the questions so as to call for direct and narrow answers and to insist on the answers being direct and narrow, rather than narrative.

It goes without saying that the tribunal will seek from each witness, so far as each is able to give it, detailed proof of the essential facts in the case. While the basic issues are to be kept simple and clearly defined, "*an constat de nullitate in casu*," this does not preclude very detailed presentation of evidence which may be necessary in certain cases to establish the ultimate fact, validity or nullity, beyond possibility of fair controversy.

Exaggerations, however, in the witness' testimony make a bad impression. Understatement produces a favorable reaction in everyday conversation, as we are all aware. It carries with it an implication of fairness and strength and develops a feeling of confidence which exaggeration destroys. If a witness tells the essentials of the story as he actually remembers them, without exaggeration and without calling upon his imagination, or his judgment, and freely admits those aspects which are to the advantage of the *Defensor Vinculi,* the story has a strong ring of truth to it.

On the other hand, no case is perfect. Indulging in self-deception in preliminary discussions with the priest and in preparing for trial is dangerous and often fraught with disaster for the person who does not realize the weaknesses in his marriage case. If there is a weakness in the case it is the best policy to face it squarely, fitting it into its proper perspective. The tribunal well knows that human beings have many frailties and it will better understand the merits of a case where there has been no attempt to cover up the normal human frailties which can most readily be assumed to have had a bearing upon the conduct of the party to the marriage. Taking people as they are, acting as they frequently act, the

tribunal will be better able to determine whether in the actual case they did or did not contract a valid marriage. To attempt to present the parties as something more or less than human is simply to assume that the tribunal does not understand people and how they behave. This is, of course, fatal to one who hopes thereby to make out a convincing case.

Since, however, some petitioners attempt to cover up the weak spots in their cases it may be necessary for the *Defensor Vinculi* or the tribunal to seek out those weak spots. One way in which this can be done is by looking for exaggeration of reactions. Another way is to look for exaggeration of claims, e.g., the amount of injury the *oratrix* suffered from her father when she refused to marry the man. Still another way is to look for an absence of normal reactions. Some people may have marvelous control of their reactions even under severe provocation and the party or witness may be of such a type, but the ordinary individual "flies off the handle," under certain circumstances. If, then, the individual in question did not react as one would normally expect, there may be an opening for the *Defensor Vinculi* or the tribunal to ask questions which will destroy the pretty picture which has been made in a case which is too "pat" to satisfy one's sense of the fitness of things.

Ordinarily the points which have been mentioned thus far will serve to enlighten the tribunal as to the qualifications of the witness and will enable it to evaluate the testimony which he has given. There may, however, be cases in which the testimony applies to a vital part of the case and is such as to tip the scales in favor of the petitioner, and, yet the *Defensor Vinculi* and the tribunal are satisfied that the witness is either honestly mistaken or deliberately false. Even after the tribunal has asked itself: what interest has the witness? what opportunity for observation did he have? what occasion did he have to note and remember the facts? is he influenced by sympathy or prejudice? how reasonable is his

story? it may find that the answers give no loophole. The witness has given prompt and disarming answers, let us suppose. He appears to be wholly disinterested, and to be merely recounting a matter which chanced to come within his observation. Yet, the tribunal may feel that there is something wrong.

One could then proceed by having the witness repeat his story, asking for amplification here and there and for details of this or that section. Sooner or later some weak spot may develop. In getting the witness to repeat his story it is better not to take the witness through it in the same sequence in which he presented it before, for that may be the sequence in which he mastered it. It might be better to start with some point in the middle of the story, then a point at the end, and then a point in the beginning. If the story is a fabrication the witness may then become confused to such an extent that the weight of his testimony will be lost.

Another approach is by exploring conjectures. Certain expressions are commonly used by witnesses which of themselves indicate that the witness is indulging in mere conjecture. Such phrases as "It seems to me," "probably," "perhaps," "I think," "I believe," "I would say," indicate rather clearly that the witness has no definite recollection and is offering his conclusions as to what likely occurred. Going more thoroughly into the matter and seeking not what the witness conjectures but what he actually recollects will enable the tribunal to make a much better estimate of the value of his testimony.

The difficulty of the exploratory approach is that it is time consuming. It may take a considerable amount of careful questioning to bring out the fact that the story has been carefully rehearsed in advance, in the case of some witnesses. Yet, it would seem that it is time not wasted when one considers that it is the judgment as to the validity of the Sacrament of Matrimony which depends upon the record that is made in the particular case.

When all of this has finally been done, and the court has found two or three witnesses who are beyond challenge and who are consistent and firmly accordant with themselves testifying under oath as to some thing or fact of which they themselves have knowledge, it can proceed to consider the weight to be given to their individual testimonies. The state in life of the person, his uprightness, and his position of dignity, if any; the fact that he testifies of his own knowledge, especially as to what he saw and heard himself, rather than as to his belief, to some report, to what he heard from others; the fact that he is constant and firmly concordant with himself, rather than varying, uncertain, or vacillating; the fact that others testify to the same thing, so that he is not a lone witness, will all have a bearing on the weight to be given to his testimony.[33]

Individual witnesses, however, precisely because they are individuals will hardly agree in every point of their testimonies. In fact, it would be rather strange and possibly suspicious if they did agree in every point. Their powers of observation differ, and so do their memories. Further, they are not likely all to be equally interested in what is going on. Hence it is natural that there will be differences in what one says and in what the other says. It is for this reason that the Code wisely provides that if the witnesses are not in accord the judge is to consider whether their testimonies are mutually opposed to each other, i.e. contradictory, or whether they are simply different, as they well may be, or whether the testimony of the one aids the testimony of the other.[34] It is quite conceivable that the witnesses may come together on the key points of the case and be quite diverse as to other points, but, between them all, provide a rounded picture of what actually occurred.

[33] Can. 1789, Instruction, *Provida,* Art. 136.

[34] Can. 1790.

When the testimonies are contradictory one of the other the situation may be that they mutually elide each other, so that there is no evidence left to be weighed on either side. On the other hand, it is possible that as one balances the person of one witness against the person of the other witness one is forced to accept the testimony of the one and reject the testimony of the other. This would be the more likely to occur if the testimony of A not only causes the tribunal to reject the testimony of B, of itself, but is likewise bolstered by the testimony of C which also contradicts the testimony of B.

Thus, when all possible challenges to the person of the witnesses and to the testimony they have given have been considered and the weight which the tribunal should give to what has been said has been carefully evaluated the judges can proceed to render their decision in the case with that moral certitude drawn from the acts and proofs which is required.[35]

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[35] Can. 1869; Instruction, *Provida*, Art. 197.

THE DEDICATION OF PROPERTY TO THE FIXED PATRIMONY OF A CHURCH*

Part II

THE decree *Ambitiosae,*[66] in proscribing alienation of church property, employed the phrase "*immobilia et mobilia pretiosa Deo dicata*". That text warrants use of the term "dedicated" as expressing the distinctive quality of property which belongs to the fixed patrimony of a church. Many of the older canonical writers described what we call fixed patrimonial property as property "incorporated into a church".[67] The acts by which a property comes to belong to a fixed patrimony are thus called "dedications" and "incorporations". Because in American usage "incorporation" usually connotes the act of forming a moral person rather than the acts by which property is devoted to its uses, we prefer to employ the term "dedication" in the present context.

The acts of dedication are markedly different in these two alternative circumstances: where the dedication to fixed patrimony coincides with the act by which the church acquires or first exercises dominion over a property, and where a property already belonging to the free patrimony of a church is dedicated to the fixed patrimony.

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N.B. The present text is the second and concluding part of this article; the first part appeared in the April quarterly of the current year.

[66] Ex. Comm. 3, c. un. *de rebus ecclesiae non alienandis.*

[67] See, e.g., 3-1 Schmalzgrueber, *op. cit. supra* note 15, at 449, n. 40; 3 Pirhing, *op. cit. supra* note 13, at 120, n. 16; 1 Ferraris, *Bibliotheca,* 183, nn. 1, 2 (1885).

A. Property Dedicated at Its Acquisition

In this circumstance, dedication may be complete before the property is acquired, or the property may have been destined by its former owner to be held by the church as fixed patrimony and the act by which the church acquires the property or exercises dominion over it completes that destination and dedicates the property.

1. Property Anteriorly Dedicated

The most obvious case of property fully dedicated anterior to its acquisition is where a property belonging to the fixed patrimony is alienated, with or without solemnities. The proceds of the alienation, the money or other property realized in the exchange, is substituted for the alienated property, according to the doctrine of property representation which we have described above.[68]

A case of anterior dedication which occurs not rarely is that in which the territory of a parish is divided, and in the division of property, a church edifice, the filial church of the parish divided, is given to a neighboring parish or to a newly established parish.[69] The edifice comes to its new owner burdened with a dedication to fixed patrimony.

2. Property Dedicated Through the Donor's Destination

Where the property acquired is not previously dedicated, but is destined by a former owner to be held as fix patrimonial property, it may be that the owner who so destines his property acts upon consultation with the donee church, or it may be that his act is complete and irrevocable before the church becomes aware of it.

Cases of the latter sort may be fraught with difficulties. Let us suppose, for example, that a father, by deed or will, gives to his son a life estate in his lands and, by the same act, gives the remainder estate to the parish where the lands are sit-

[68] See text *supra* at notes 18, 19, 20, 21, 22, 23, 24.

[69] See Can. 1427, 1500.

uated, but for use only as a parish cemetery. Clearly, the landowner has imposed upon his gift to the parish a dedication to fixed patrimony, for he requires a use of the land which can be accomplished only if the parish permanently retains the land and employs it for burial purposes. If he had consulted the parish administrator before his deed or will became effective, there might have been brought to his attention facts which would have caused him to impose no specific use upon the land, or to allow the parish some discretion in electing a suitable employment for the property. But we will suppose that the deed has been delivered to the son or that the father has died, so that the son has come into possession of his life estate when the parish administrator is first apprised of the act of gift.

It may be that, because the parish is committed to use a diocesan cemetery, the administrator does not accept the gift, but renounces the gift promptly upon being advised of it. In such event, it is certain that the deed or devise fails as to the remainder estate. That estate revests in the donor if his gift was by deed and he is still living, or, if he is dead, the remainder vests in his heirs or in the residuary devisees under his will. Such timely renunciation or dissent is not an alienation, for the act affects no property dedicated to fixed patrimony; rather it prevents the incorporation of the land or of any interest therein into the fixed patrimony of the parish. The donor's destination can be perfected, and become a dedication, only by assent of the donee church—that assent being refused, the destination is without effect in respect of the church patrimony. Thereafter, the donor or other persons vested with the remainder by reason of the administrator's dissent may convey the remainder estate free of the former pious destination. And if this conveyance were made to and accepted by the donee church, there would arise, by reason of the frustrated destination, no dedication of the property to the fixed patrimony of the parish. It should be noted that we have supposed the dissent was made "timely", *in*

limine,—the estate would have vested indefeasably and the dedication would have been perfected if the administrator, by dealing with the property or by undue delay in renouncing the gift, had implicitly accepted the gift.

If, indeed, the administrator, upon learning of the deed or will accepts the gift, explicitly or implicitly, the land, when it comes into the possession of the parish upon the termination of the son's life estate, will be in the fixed patrimony of the parish, and will be inalienable. More than that, the dedication, immediately it is effected by implicit or explicit acceptance of the gift, incorporates into the fixed patrimony of the parish the remainder estate, so that the church has an inalienable property even during the son's lifetime.

To illustrate implicit acceptance of the gift by dealing with the property, let us suppose that the son, upon coming into his life estate, brings to the administrator the first intimation of his father's benefaction to the parish, and that the son then and there proposes to buy the interests of the parish as remainderman. The proposed assignment will frustrate the father's will as to the disposition of his property and will thus violate canon 1514. In addition, the proposed assignment will be an alienation of property dedicated to fixed patrimony. By exercising the power to assign its future estate, the parish will implicitly accept the gift and will thus perfect into a dedication to fixed patrimony the destination imposed by the donor. Even if the assignment be licensed as an alienation, the price received will be a substituted property and will be held subject to the same patrimonial dedication as the estate assigned.

It may be suggested that, before or after the dedication to fixed patrimony has been accomplished, the father's will may be modified so that sale of the land or assignment of the remainder estate, or employment of the property for other than cemetery purposes, would not violate canon 1514. Such modification may be accomplished by assent of a living donor, or

by exercise of authority under canon 1517 to alter the dispositions of an *ultima voluntas ad pias causes*. Civil recognition of such modification can be had if the donor consents and if the *cy pres* power is found applicable to alter the terms of a charitable gift. Of course, any modification must take account of the interests of third persons. To determine what those interests are in the present case, it will be necessary to consider the terms by which the cemetery use was imposed; whether the gift over involved a limited fee, a condition subsequent with right of re-entry, or a covenant only.

Modification, if properly made before acceptance has completed the dedication, will cause the eventual acceptance of the property to effect an incorporation into the fixed patrimony, or not, according to the character of the destination as modified. No alienation will be involved. But modification after the property is dedicated to fixed patrimony may involve an alienation, and it may involve more. If the modification directs that the land be used as a playfield of the parish school, instead of as a cemetery, the property remains in the same fixed patrimony and is not alienated. If the modification permits a sale, there is an alienation. If the proceeds of the sale are to be devoted to purposes other than fixed patrimony, for example to pay for the current operation of the school, then a dispensation of canon 1531, § 3, in which the Holy See alone is competent, regardless of the value of the property involved, will be required.[70]

3. Property Dedicated Through the Donee's Solicitation

Where the owner makes the destination after consulting with the church, or where he consults the church before delivering his deed to his grantee, or before his death, where conveyance is made by will, he may be persuaded to forbear to impose a dedication or to change a dedication which would impair the usefulness of the property when the church should receive it.

[70] See text *supra* at note 22, and the paragraph there following, and *infra* at notes 72-74.

In such face to face dealings the gift is often made by a donor in response to a request that he give his property to the fixed patrimony of a church, or a promise is made to him that the church will receive as fixed patrimony property which he gives to it. Out of such request or promise there may arise a contract between the donor and the church. Out of the donor's contract to make a will or a deed in favor of the church arises an incorporeal property which is owned by the church from the time the contract is made until the donor, having made the will or deed as agreed, dies or delivers the deed. This contract right is a "chose in action"; the Civilians call it an "incorporeal property". This incorporeal property becomes fixed patrimony immediately the contract is made, and it cannot thereafter be alienated without solemnities. One of the acts which would constitute an alienation of such fixed patrimonial incorporeal property is the refusal of the church to accept the legacy or the deed when the will is probated or the deed delivered.

Where there is no contract, the man who proposes to make a gift by will or by deed has no obligation to make the testamentary provision or, having made it, to leave it unchanged until his death; nor is he obliged to make or deliver his deed. The church to which such a gift is to be made has no right to the gift property. No property accrues to its patrimony unless and until the donor, having made the will or deed as proposed, dies or delivers the deed. Before that time, the church may be said to have an expectancy, and the expectancy may have economic value because banks or others are willing, in view of the expectancy, to lend money to be repaid when the church gets the legacy or deed which it expects. But the expectancy is not a right; it is a possibility only, and adds nothing to the patrimony of the church.[71]

[71] Similarly, the general credit of a church is no part of its patrimony. Here the banks are willing to lend money in view of the prospect that the church will have sufficient surplus income to retire the loan. Their willingness to lend may be described as an asset of the church, but the church has no right to require that the loan be made, so that the asset is not a property in the patrimony, fixed or free, of the church. Of course, this credit will become a prop-

Solicitation and promises often effect a dedication of property to fixed patrimony in building fund situations. It may be that contributors would give money to a church for use in advancement of any church purpose. But where the contribution is made in response to and in reliance upon representations that the fund will be used for purposes of fixed patrimony, the moneys when received are under dedication to fixed patrimony. To expend them for purposes other than those for which they were solicited is an alienation and requires the solemnities.

4. Special Problems in Property Dedicated at Its Acquisition

a. Donors cannot release property from fixed patrimony. The donors, can not, by their consent given after they have contributed property which is dedicated to fixed patrimony by a destination or solicitation, remove the dedication. Once received, the funds are church property and their disposition is governed by the canons. The canons enforce the will with which property is given to a church,[72] and they direct that the donors be consulted in certain matters concerning the application of their gifts.[73] But nowhere does it appear that a change in the donor's will can take church property out of the operation of the canons which govern it as fixed patrimony.[74]

b. Specific funds which may be fixed patrimony or not. These considerations of dedications to fixed patrimony arising out of donors' destinations of their property and donees' solici-

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erty if a line of credit is contracted for between the church and a lending institution. That contract right of the church, an incorporeal property, will belong to its fixed or its free patrimony according as the money to be borrowed is to be put into the fixed or the free patrimony of the church.

[72] See Can. 1513, § 2; 1514; 1515; 1516. Cf. Can. 533, § 1, nn. 3, 4, § 2; 535, § 3, n. 2.

[73] See Can. 1410; § 1; 1492, § 2; 1494; 1489, § 3; 1417, § 1; 1500; 1501; 494, § 2; 1520, § 3; 1523, n. 3; 1532, § 3; 1538, § 1.

[74] Cf. canons cited *supra* notes 72 ,73.

tations require close attention in two practical matters especially. In the matter of perpetual care of cemeteries, there are some situations in which the laws of alienation apply and some in which they do not. If the representation is made to a plot-holder that his "perpetual care" money—contributed when he buys the lot or thereafter—will be invested and its yield only made available to pay for maintenance of his plot, then his contribution becomes, upon its acceptance, part of the fixed patrimony of the cemetery or of the parish which owns the cemetery. But if the deed or the by-laws indicate that the cemetery does not undertake to set up an endowment fund, but assumes only a contract obligation to keep the plot in repair, acceptance of the contribution does not make the money part of a fixed patrimony.

Where the person contributing property in consideration of a long-term beneficial right is itself a moral person in the Church, the problem has another aspect. For example, a diocese gives to a regional seminary $25,000 as a burse fund, receiving in return the right to have the tuition and maintenance of one student each year. The right which the diocese acquires is a property which is incorporeal, because it is a contract right. Yet the right is a church property and because, under the contract, it is to be retained and used for a long time, it is part of the fixed patrimony of the diocese and is not to be alienated without solemnities. This is true whether the contract requires the seminary to keep the $25,000 invested and to use its income only, so that the fund is part of the seminary's fixed partimony, or whether the contract permits the seminary to use the $25,000 at discretion, so that the contract does not dedicate the fund to the seminary's fixed patrimony.

B. Property Transferred from Free Patrimony to Fixed Patrimony

We have discussed the ways in which dedication to the fixed patrimony of a church arises in the very act by which that church acquires for the first time ownership of a property. It now remains to examine how property which is already owned

by a church, and which is held free of dedication to fixed patrimony, may be so dedicated.

1. The Commitment to Hold Property in Permanent Tenure

Since we have demonstrated that no property of a certain type, money, securities, other productive movables, or real estate, is subject, *eo ipso,* to a fixed patrimonial dedication, we cannot now assert that property held in the free patrimony becomes dedicated to fixed patrimony simply because it has, or comes to have, a permanently useful or productive character. That statement would make meaningless the doctrine of property representation. That view would hold dedicated to fixed patrimony a piece of realty devised to a church with directions to sell it and to expend the proceeds freely for any need of the church. Under that view, a similar dedication would be maintained where a pastor took money from his current collections and put it into interest accrual government bonds, intending to sell the bonds three years later to meet an extraordinarily heavy payment for fire insurance premium which would be due at that time. But under the doctrine of property representation there would be no dedication to fixed patrimony in either case. The realty devised and bonds purchased both stand in the place of cash receipts subject to disbursement for current expenses.

In order to formulate a correct rule on the means by which free patrimonial property is dedicated to fixed patrimony, we must look to the same consideration which enabled us to determine how a dedication arises in the case of property coming, for the first time, into the ownership of a church. There we found that the dedication to fixed patrimony of the church which acquires property is effected, or at least completed, by a commitment on the part of the acquiring church to hold the property in permanent tenure, to conserve its substance while retaining freedom to dispose of its use and yield. That same commitment is the means by which free patrimonial property is dedicated to fixed patrimony, and the commitment here may or may not occur in an act by which the free patrimonial property is converted to another type or form. Usually, there will be such a conversion concommitant with the commitment

or dedication, because free patrimonial property is commonly held in the form of money or other fungibles, while fixed patrimonial property is generally held in a less liquid form. But to view the conversion of property from one type to another as the controlling factor in dedication to fixed patrimony, would throw us back to the untenable position that such dedication can exist only in property of two types, immovables or nonfungibles.

2. The Administrator's Duties in Respect of Free Patrimony

In order more clearly to justify the rule that free patrimonial property is dedicated to fixed patrimony by binding commitment of the church concerned to hold the property in permanent tenure, we should examine the typical character and the juristic status of free patrimonial property. Nearly always, property comes to the free patrimony of a church in the form of money or its equivalent, because it accrues to the church as revenue on fruitful property or as contributions made out of the current income of the donors. Extraordinarily, free patrimonial property may come to a church in the form of immovables of nonfungibles, as in the case of the devise of realty just mentioned,[75] or as where a parishioner contributes some small item of jewelry or a savings bond to be sold for the general purposes of the parish.

The legal status of free patrimonial property appears from canon 1523, which describes the administrator's chief duties in respect thereof. Of these duties, two are primary and absolute; the third is secondary and contingent. His primary duties are to conserve the revenue and contributions received, and to expend them to meet the expenses of the church. The canon [76] indicates that the expenses contemplated are limited to the operational expenses of the church—those incidental to its regular activities. This is implied by reference to the charter of the institution, and to particular regulations which govern the administrator's expenditures. The classic Roman

[75] See text *supra*, near the end of Section B (1) of this Part.

[76] Can. 1523, n. 3.

document which embodies such limitation, describing the acts of " ordinary administration ", is the *Statuta Generalia* for the Dioceses of Holland approved by the Sacred Congregation for the Propagation of the Faith in 1856.[77] Diocesan statutes or regulations everywhere direct the manner in which the administrators shall conserve the receipts and limit the purposes and amounts of their expenditures.

The duty of conserving receipts has its first reference to the purpose of having the receipts available to meet necessary expenses. Therefore, when administrators act to conserve these funds, they must not only keep the property safe; they must keep it relatively liquid. The degree of liquidity in which these funds are to be kept is evidently determined by the immediacy of the expenses which can make demands upon them. Some receipts will have to be kept in money of small denomination, in a safe place of course, but readily at hand, to serve as a petty cash fund for small expenditures which must be met immediately. Money destined to pay expenses which occur with known frequency and regularity will be deposited in demand or checking accounts. Other methods of conserving funds are usually regarded as exceeding the mode of ordinary administration and require the local Ordinary's permission in writing. Funds destined to meet large expenditures which occur infrequently may be permitted to be put into time accounts where notice of withdrawal may be required, or into bonds whose sale may require some time. Because of the difficulty of realizing money put into real estate, and because ownership of such property involves special obligations, such as taxes and tort liability, and also creates problems of management, it will be a rare case in which current funds are permitted to be conserved by investment in realty.[78]

[77] *Collectanea,* n. 1127, art. 20; 7 Gasparri, *Codicis Iuris Canonici Fontes,* 346, 347, n. 4841 (1935). See also S. Congr. Concilii, Litterae Circulares, 20 giugno 1929, n. 41; 21 *Acta Apostolicae Sedis,* 384, 394 (1929) (For the Ordinaries of Italy). Cf. Bernier, " De patrimonio paroechiali," 18 *Jus Pontificium,* 198, 207, 208 (1938).

[78] The *Statuta Generalia,* cited *supra* note 77, at *item b,* declares any purchase of immovable property requires the Ordinary's license in writing.

We have made these points in reference to the conservation and expenditure of receipts in order to demonstrate the secondary and contingent character of the administrator's duty to invest surplus income. There is no surplus available for investment under the fourth number of canon 1523 until the receipts have been charged with the expenses as directed in the third number of the canon. The Code does not limit the charge of expenses against receipts to a year or to any other fixed period. Therefore, it is only when the receipts on hand and under conservation exceed all reasonably foreseeable expenses of a church's normal function, that a surplus exists which may be invested under the direction of canon 1523, n. 4°.

This distinction between the administrator's primary and absolute duties on the one hand, and his secondary and contingent duties on the other, prevents the confusion in which all deposits of money at interest and all purchases of immovable or nonfungible property made by a church administrator may be regarded as investments governed by the fourth number of canon 1523. That such deposits or purchases may involve acts of extraordinary administration and so require license of the local Ordinary under canon 1527, does not remove them from the class of acts by which receipts are conserved and place them within the class of acts by which surplus is permanently invested.

3. The Acts by Which Free Patrimony is Dedicated to Fixed Patrimony

This permanent investment of surplus, described in canon 1523, n. 4° is only one type of act by which free patrimonial property is dedicated to fixed patrimony. A distinct type of act effecting such dedication is that by which money conserved in free patrimony is used to purchase or to improve or embellish properties serving permanently a continuing need of the church. The third type of act by which free patrimonial property is dedicated to fixed patrimony differs from the other two in that it involves no conversion of property from one form to another. In this third type of act, the church is committed to hold in permanent tenure, with freedom to dispose

only of its use or yield, an individual property over which it had, heretofore, full power of disposal, even as to the substance.

a. The Investment of Surplus Income as Endowment. In examining these three types of act, we first give attention to the act of investing surplus receipts, because that is clearly described in the Code, in the fourth number of canon 1523. The canon uses two verbs, *collocare* and *occupare,* which are synonyms in signifying the act of putting money out at interest. Yet it is to be remarked that the verb *collocare* has the particular sense of making an investment permanently and for the specific purpose that there shall be derived from the invested fund an income to be spent in pious works. *Collocare* has that sense in canon 549, where it describes investment of the dowry of a woman religious; and in canon 1516, § 2, where *collocare* has reference to the investment of funds held in trust for pious purposes; and in canon 1531, § 3, which directs the investment of property received in exchange for a fixed patrimonial property in an alienation accomplished with canonical solemnities.

Because canon 1523, n. 4° uses both *collocare* and *occupare* which describe the act of putting out money at interest, and because the surplus receipts are designated by the term *pecunia,* we believe the canon has direct reference to the conversion of surplus receipts into interest bearing deposits and interest bearing securities. Yet, where investments in shares are as safe as investments in bonds, there appears no reason to exclude as improper investments whose income is not paid as interest at a fixed rate, but is paid regularly in proportion to the distributable income of the business which offers the shares. Both as to safety of principal and as to regularity of return, A. T. & T. stock is not inferior to industrial bonds; as the value of the stocks may increase whereas the value of the bonds cannot, the stock is more secure against the dangers of inflation.

The canon does not forbid that the surplus be invested in realty which yields fruit or rent. Canon 1415 directs the investment of the initial endowment of benefices in either productive lands or in paper securities. The purpose of that canon is essentially the same as that of canon 1523, n. 4°, namely, to create a safe investment of principal yielding a reliable income, and in the earlier canon *collocare* describes both classes of investment. We should not, therefore consider *collocare* to exclude in the later canon investment in lands.[79]

But the terminology of canon 1523, n. 4° seems not to contemplate the use of surplus receipts to purchase, improve or embellish properties which are held for the use of a church, not for income purposes.[80] Therefore we shall treat such conversion of free patrimonial property as a distinct means of dedication to fixed patrimony.

Before passing to consideration of that problem, we should note that the duty of the administrator under canon 1523, n. 4°, to convert surplus receipts into fixed endowment, is a contingent and not an absolute duty, even after the existence of a surplus has been established. The canon requires such capitalization of surplus receipts only where the step can be taken "*utiliter*", and where the Ordinary's consent has been obtained. This affirmative judgment that the conversion to endowment can be made "*utiliter*" cannot be predicated only upon the circumstances that safe and fruitful investments are available, nor even upon the added fact that the church would benefit by having a regular income from the endowment. The judgment must also consider whether the church might benefit more from acquiring or improving useful property which does not yield income.

[79] That *collocare* in canon 1531, § 3 refers to purchase of productive lands is evident from the Declaration of the S. Congregation of the Council, 17 Dec. 1951, quoted *supra* note 22.

[80] Compare the language of canon 1523, n. 4: "Pecunia ecclesiae quae . . . utiliter collocari potest . . . in emolumentum ipsius ecclesiae occupare" with that of canon 1531, § 3: "Pecunia ex alienatione percepta caute, tuto et utiliter in commodum Ecclesiae collocetur," and see the construction of the latter provision in the decree of the S. Congregation of the Council, 12 July 1919, quoted *supra* note 22.

b. Conversion of Surplus Income into Property of Permanent Use. The second type of act by which free patrimonial property is dedicated to fixed patrimony is that in which the free property is expended to acquire a property which will be permanently devoted to the use of the church, though it yield no income to the church. This sort of dedication is most clearly expressed in the ritual acts by which lands, buildings and nonfungible movables are blessed or consecrated and thus devoted to the uses of religion.[81] Yet we have seen that the canons on benefices include among the fixed patrimonial property, houses for the residential use of beneficiaries, and the furnishings of those houses. And those canons direct that free patrimonial property shall be used, in some circumstances, to make repairs upon those houses.[82] The expenditure of free patrimonial property to acquire, improve or embellish such houses and their furniture must, therefore, constitute a dedication of free patrimonial property to the fixed patrimony. But other moral persons in the Church, a parish, for example, will often have need of other immovable and nonfungible property to carry on their functions, which are as enduring as and even more diverse in their exigencies than the functions of a benefice. A parish needs, not only a house of worship and a pastor's residence and perhaps a cemetery, but also schools and teachers' residences, a social center, all with proper furniture and equipment. We see, therefore, that these latter buildings and their furnishings will constitute part of the fixed patrimony of the parish, and that free parish patrimony used to acquire, improve or embellish them will be dedicated to fixed patrimony as truly, though without ritual solemnity, as is such property expended to acquire, improve or embellish a consecrated church or a consecrated chalice.

c. Dedication of Free Patrimony to Fixed Patrimony by Declaration Only. Finally, we have the commitment or dedi-

[81] Cf., e.g., Can. 1497, § 2; 1154; 1160; 1162; 1165, §§ 2, 4; 1169; 1182; 1183; 1186; 1187; 1191; 1205, § 1; 1206; 1280; 1281; 1296-1303.

[82] Cf. e.g., Can. 1477, 1483.

cation to fixed patrimony of free patrimonial property, effected without conversion of that property to another form or type. This commitment or dedication is similar to the declaration of trust in American law. A man may by a unilateral declaration confer the beneficial ownership of his property upon another person or upon undetermined persons to benefit from a charitable activity, while retaining legal ownership of his property and keeping it in whatever form it existed before the declaration.[83] The canonical doctrine of property representation, especially as we have seen it illustrated by the older canonists, clearly indicates that where a church administrator competently sets aside a portion of the free patrimony to serve as an endowment or to serve permanently the uses of his church, the free property in question is immediately dedicated to fixed patrimony. It may be a piece of land so situated that to employ it for cemetery purposes will require no external change—the determination of commitment so to use it is sufficient to effect the dedication. Again, the free property may be a savings account created only to conserve church receipts—the commitment to hold it as an endowment fund suffices to effect its dedication to fixed patrimony. Or the free property may be receipt money now set aside as a fund to build a parish school; here the fund immediately represents the school which, when it is built, will be an immovable property in the fixed patrimony, so that the fund itself is now dedicated to fixed patrimony.

4. These Acts Exceed the Powers of Ordinary Administration

We should observe that all three types of dedication involve acts of extraordinary administration and require the local Ordinary's concurrence.[84] His consent is explicitly required in

[83] See, e.g., *Young* v. *Holland*, 117 Va. 433, 84 S.E. 637 (1915).

[84] Whether the administrator who acts is an inferior who requires the Ordinary's license under canon 1527, or the Ordinary himself, the advice or consent of the Ordinary's Council of Administration will be required in transactions "of greater moment". Can. 1520, § 3. (Cf. Can. 1532, §§ 2, 3; 1533; 1538; 1539; 1541, § 2; 1542.)

canon 1523, n. 4°, where surplus receipts are invested as endowment funds. And canon 1527 clearly applies to acts of acquiring, improving and embellishing permanently useful property, immovable or movable, for these are evidently acts of extraordinary administration. If these acts, which directly effect an endowment investment or directly acquire, improve or embellish a permanently useful property, require the consent and permission of the Bishop, it is manifest that no administrator has within the scope of his ordinary competence the power effectively to declare that a free patrimonial property shall hereafter be held to a fixed patrimonial use. That too requires the local Ordinary's license, and the administrator's acts and declarations do not effect a dedication unless such license be had.

C. Proof of a Dedication

To prove that a free patrimonial property has been dedicated to fixed patrimony is rather easy where the property was converted into a consecrated or blessed property such as a cemetery, or a church, or a chalice. The inference of dedication is equally strong where the property acquired is one which serves a permanent need, for example, a parish school. The written license of the local Ordinary, where that writing is preserved will be decisive proof of the dedication in any case.[85] Where there is no written license, and where the property in question is held in a form in which free patrimonial property may be properly retained, such as in a savings bank deposit or in bonds of small denomination, proof of the dedication may be difficult.

The same facilities and difficulties arise where the property is alleged to have been dedicated in the act by which the church first acquired it. A writing which expressed the donor's destination of the property will be helpful.[86] The Bishop's written license [87] to accept the property for a fixed patrimonial

[85] Cf. Can. 1813, § 1, n. 2, § 3; 1816; 1817.

[86] Cf. Can. 1813, § 3; 1817.

[87] Cf. canons cited *supra* note 85.

purpose will be conclusive. The fact that the gift property has been permanently employed for a patrimonial use, as for a rectory or convent, will afford strong proof of dedication to fixed patrimony. But the situation is ambiguous where an immovable gift property has been held for rental or a legacy has been retained as a time deposit or in securities.

The Code, in canon 19, imposes strict interpretation upon laws which "restrict the free exercise of rights". Some commentators have construed this provision to create a presumption of law that property whose dedication to fixed patrimony is dubious must be held to belong to free patrimony—else, they argue, the rights exercised by the administrator in disbursing free patrimonial property to meet the operating expenses of his church would be limited upon a doubtful premise.[88]

It may be suggested that presumptions of fact arise out of the circumstances of various cases. Thus, where a donor's will directs his executor to convey his residence directly to his parish church, but to convert his other property into cash for distribution to his legatees, there is some basis for presuming that the testator meant the parish to take his house for use as a rectory or convent, or to hold the house for rental. But no presumptions "*hominis*" are conclusive. Indeed they are no more than inferences, which are only as strong as the evidentiary facts which support them and the logical coherence seen to exist between those facts and the conclusion which is said to be "presumed".[89] If a fact, in its circumstances, is equally well explained by a different conclusion, neither inference is helpful. For these reasons, and because endowing certain facts with presumptive force may obscure the evidentiary value of other facts, we prefer to abstain from suggesting further specific presumptions of fact in these matters. It seems better to leave any problem arising to be solved upon the general rules of proof and upon all the facts and circumstances of the given case.

[88] See Heston, *op. cit. supra* note 4, at 75, 133.

[89] Cf. Can. 1747, n. 2; 1828.

SOME PRACTICAL HINTS ON THE PREPARATION OF *"SUPER RATO"* CASES FOR THE SACRED CONGREGATION OF THE SACRAMENTS*

WHEN I was invited to present a paper at this Regional Meeting of the Cannon Law Society, I was graciously informed that I was free to speak on any subject of my choice. Presuming that the members gathered here today would be interested in remarks based on ten years of close contact with certain pieces of work in the Roman Curia, I was still confronted with a choice between the Congregation of Religious and the Congregation of the Sacraments. The choice finally narrowed down to the Sacred Congregation of the Sacraments and some practical hints on the preparation of nonconsummation cases. I felt that this topic, rather than something *"De Religiosis"*, would be most useful to the majority of the members assembled here today.

In the last ten years, whether as Defender of the Bond or as a member of one of the *"Commissiones pro decisione"*, I have worked on close to 400 non-consummation cases, ranging in bulk from the eight or ten pages of clear-cut proxy marriages between parties on different continents, to the hundreds of pages of genuinely perplexing cases presented after, sometimes, years of cohabitation. From this sustained contact with such cases over a prolonged period of time, certain points emerge as deserving of attention, since they are not infrequently the causes of needless delay, not to say the failure of cases.

First of all, a bit of statistics may provide interesting information. The *Annuario Pontificio* for 1957 lists for the

* Paper read by the Very Reverend Edward L. Heston, C.S.C., Ph.D., S.T.D., J.C.D., Procurator General of the Congregation of Holy Cross, Rome, Italy, at the meeting of the Midwestern Chapter of The Canon Law Society of America, University of Notre Dame, May 1, 1957, and at the meeting of the Eastern Chapter of the same Society, New York City, May 23, 1957.

handling of non-consummation cases 24 "*Commissarii*" who act as Defenders of the Bond and 52 "*pro decisione*". Since the latter usually work in groups of three, there are about 17 special "*Commissiones*", most of which meet on an average of once a month from November to July inclusive, usually clearing three cases at each meeting. I say "usually", because for the last two or three years, in an effort to clear out the growing backlog of cases, most of the commissions have been assigned four cases for each meeting. Because of these special efforts to get caught up, the officials of the Sacred Congregation state that a well-prepared case reaching them now can, barring the necessity of requesting supplementary information, be carried through to final decision in from ten months to a year.

When cases first reach the Sacred Congregation they are subjected to a preliminary study by one of the officials. If a case seems so clear that no discussion appears to be called for—indisputable *coarctata tempora* or an inter-continental proxy marriage—it is sent to a Commissary for a votum "*utrum directe*", i.e. whether the case can be sent directly to the Holy Father without going through the regular procedure of commission discussion. If the Commissary decides that it cannot be, then he writes a *votum* in defense of the bond.

Sometimes the preliminary study indicates that there is practically no hope of demonstrating the alleged non-consummation. In this case a Commissary is assigned to study it and prepare a *votum* "*Utrum a limine. . .*" i.e. whether the case can be rejected at the outset, so as to obviate a useless waste of time in order to clear it through the regular commission precedure. This *votum* results either in rejecting the case at once, or in sending it on for regular discussion. Very few are rejected "*a limine*" because as long as there is even a slim possibility that the case may be good, the principle is, so to speak, to give it every break.

A case which proceeds along the regular path will go through the following phases once it reaches the Sacred Congregation:

1) preliminary study by an official and a preliminary *votum "pro rei veritate"*;
2) defense of the bond, which may result in the case being returned to the diocese at once, for supplementary information, if the Defender feels that such information is needed;
3) discussion in commission by three *Commissarii* in the presence of the Secretary of the Sacred Congregation and an official acting as notary. Three affirmative votes are required. If two votes are negative, the case is rejected, barring the presentation of further proof. If there are two affirmatives and one negative, the acts are sent to a *Commissarius "ad quartum votum"*, which will either save or finish the case.
4) The findings of the Commission are returned to the *Defensor Vinculi,* that he may state if he has any further observations to make on the reasoning and conclusions of the Commission.
5) Especially difficult cases may be further discussed at a plenary meeting of the Cardinals of the Sacred Congregation.
6) Ordinary cases are summarized very succinctly and prepared *"pro audientia SSimi"*, as the Cardinal Prefect must submit every case to the Holy Father for the actual *"dissolutio vinculi"*.
7) Lastly, the Sacred Congregation prepares the rescript and sends it out to the interested diocese.

From this summary sketch of the path followed, it is clear that the Sacred Congregation proceeds with extreme caution. The dissolution of a valid and sacramental marriage is one of the highest powers of the Sovereign Pontiff, since He there acts directly as the Vicar of God, dispensing from a secondary precept of the Natural Law. No step can prudently be omitted in an effort to acquire that absolute moral certainty as to non-consummation which is required before the case can be presented to the Pope for His supreme and final decision.

Notwithstanding all this prudent care, the Sacred Congregation, as statistics show, disposes of a very large number of cases annually. The following are the summary figures for the period from November 1, 1955, to October 31, 1956, as drawn up by the Sacred Congregation for the Vatican publication "*Attività della Santa Sede*":

Faculty to construct the process	452	
Cases received	461	(392)
Cases cleared	555	(538)

The breakdown on the cases handled is as follows:

Affirmative decisions	362	
Negative decisions	115	
Deferred decisions	121	
Dropped, or sent to Holy Office	35	
Cases now ready for the Pope	43	
	676	(600)

The present situation of the docket at the Sacred Congregation is as follows:

Back to Curia for supplement	178	
Ready for discussion	189	
Under study by Officials	42	
Under study by Commissions	171	
	580	(656)

II.

I now present a few more or less random observations jotted down from time to time on points which should be borne in mind in preparing the cases.

Before sending in a request for authorization to construct the process, the party who will be the *pars conventa* in the case should always be interviewed. The request to the Sacred Congregation should be accompanied by at least a summary declaration of the *altera pars* that the *libellus* of the plaintiff corresponds substantially to the truth. As a general rule,

there is little hope of securing permission to proceed solely on the word of one party.

It is most important to clear up any doubts on possible impotence on either side before submitting a case to the Sacred Congregation. This does not have to be done through formal trial, but there should be some indication that this possibility has been adverted to and subsequently ruled out. The reason is that the dispensation "*super rato*" means the dissolution of an existing marriage bond, and the Holy Father cannot dissolve what perhaps does not exist. I recall one case clearly involving doubtful impotence, and in which the Ordinary left the doubt unsolved on the grounds that his authorization to construct the process was restricted to the alleged non-consummation! He did not realize that he needed no authorization to investigate impotence and that this point was intimately connected with non-consummation. As a result, the case was sent back to him and will be delayed one or two years.

A common lacuna is the omission of certificates of good morals and credibility for the witnesses. The reason may be that, a good deal of the time, the witnesses are known to one or more members of the tribunal and a certificate in the acts appears to be superfluous. But they forget that the entire file must be studied by persons who have to rely on documents for everything and who cannot take anything for granted. As the ancient juridical adage puts it so graphically: "*Quod non est in actis, non est in mundo!*" In one case, testimony of incalculable importance had been given by a physician, not as "*peritus*", to such a point that the outcome of the case hinged almost exclusively on his deposition. But the acts of the case contained not even so much as a word regarding his general moral character and his credibility. In the reply to its request for some declaration of reliability and professional competence regarding this physician, the Sacred Congregagation learned that he was usually the "*peritus*" of the chancery, an excellent Catholic and a weekly communicant.

The chancery probably felt that even Rome knew what a splendid Catholic Dr. So-and-so was!

It happens quite often that obscure points in the testimony of either of the parties or of the witnesses are left unclarified. This can do great harm to the cause. The *Judex Instructor* should feel free to interpose *ex officio* questions whenever he feels that the testimony calls for further clarification. This is especially true in cases of conflicting testimony. Art. 50, #1 of the Instruction provides for this possibility, but we find frequently enough that points of capital importance are left hanging in the air because the *Judex Instructor* did not feel justified in adding anything to the questions submitted by the *Defensor Vinculi.* This can be so serious as to result in the case being sent back from Rome precisely to secure a clarification of such points.

In cases where there is a possibility that a party now a virgin may lose her integrity before the time comes for the canonical "*peritia*", particularly when there is danger of an attempted marriage, it is advisable to have her submit to an examination at once by a physician indicated by the chancery. It is quite true that such an examination, strictly speaking, does not have the force of the examination by the "*periti*" designated by the presiding Judge, nevertheless it may easily turn out to be one of the most important pieces of supporting evidence in the case. It is certainly better to have this unofficial private examination than to have none at all. When the outcome of a case hinges largely on the proofs of virginity established by such an examination, the members of the Commission will not be so pedantic as to throw out these proofs simply because they were not reached through a "*peritia*" conducted under the auspices of the Court.

Some chanceries are content to send in mere "certificates of virginity" as the reports of the "*periti*". It is hardly necessary to point out that such certificates are totally insufficient. The reports of the physicians should provide detailed information on the form and type of the hymen, the size and

location of the *orificium* and, which is of the utmost importance, a statement as to its degree of elasticity and penetrability. It might be well to advise the "*periti*" explicitly that their conclusion should answer the question usually formulated by the Sacred Congregation when it requests supplementary information on the physical argument: "*Utrum, ratione habita naturae generalis et elasticitatis hymenis, excludi debeat qualiscumque penetratio, etiam minima, intra vaginam?*" A categorical answer to this question from the outset would eliminate much uncertainity and delay later on.

No case should ever be sent on to Rome unless even apparent divergencies in the findings of the "*periti*" have been thoroughly clarified. Sometimes these reports are merely sent in as they are, without any attempt to clear up points of at least apparent conflict which could eventually weaken the force of the physical argument. In such cases a "*peritior*" should always be summoned, and, if possible, the "*periti*" in disagreement should be questioned together, in order to reconcile differences in terminology and the like. It is most important that the over-all picture of the physical argument should be as complete and coherent as possible, especially when it may be the determining factor in counterbalancing weaknesses in the moral argument.

One thing which the Commission finds exasperating is to encounter a lengthy discussion by the Defender of the Bond in favor of the alleged non-consummation! This is hardly in keeping with the nature of his office! The Defender of the Bond is to be exacting, but no one expects him to be exaggerated or unreasonable in the performance of his duty. He is supposed to defend the bond. Sometimes the Defender brings up difficulties only in order to solve them in favor of the alleged non-consummation! If he can find no objections, let him say so, but this does not authorize an eloquent plea on behalf of the desired dispensation.

Lastly, it is impossible to over-emphasize the importance of a clear and strong expression of opinion by the Local Ordinary.

The *votum Ordinarii* is of capital importance because, with his direct knowledge of all the circumstances and of the persons involved, he is in the best possible situation to evaluate objectively the testimony of the parties and the witnesses. Some Ordinaries seem to be afraid to make their opinion firmly, for fear of giving the impression of trying to influence the mind of the Holy See. The Sacred Congregation wants to know *what* the Local Ordinary thinks, and *why*. This opinion is not final, of course, but it is of great value, particularly in cases in which there may be some blind spots on the score of moral certainty. The Ordinary should not be afraid to face up to the difficulties of the case and to offer his solution.

These are the points to which, in the light of experience, I thought it would be well to call to your attention. The mind of the Sacred Congregation inclines towards benevolence, in the sense that it wants to push cases on to favorable decisions when at all possible. But benevolence cannot be a block on which the requirements of law can be sacrificed in a matter which touches so closely the supreme vicarial power of the Sovereign Pontiff. The concern of the Sacred Congregation for all such points stems from its desire to do everything possible to bring relief to those members of the Church who are in unfortunate circumstances, while at the same time safeguarding the dignity and nobility of the "Great Sacrament".

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ROME, ITALY

STUDIES DURING THE CANONICAL NOVITIATE

IF anybody lives as a whole, it is women religious who do it. They know best how to bind together the powers of soul and body. Consecrated women make religious life a thing of love. And a woman's love, especially when it is the love of God, is more powerful and exceedingly sweet and delightful. Because the Sisters in the United States live by love, they are building for Church and country a bulwark of spiritual strength and a perennial fountain of joy.

Men and women religious give to the world what it needs, a re-incarnation of the way of life of the God-man, Who so nobly carried life's yoke, and by His manner of life and word of doctrine alleviates and refreshes those who are burdened.

One of the many splendored facets of the Sisters' progress in the total renovation of their beautiful life is the academic program prepared at the Everett Curriculum Workshop during the summer of 1956. The aim of the Everett Workshop was to give Sisters a workable program for the type of scholarly attainment the Holy Father has repeatedly recommended.

Under the subtitle "Course Load" there is in the Everett Report a statement which attracts the attention of one interested in Canon Law. The statement deals with the canonical year of novitiate and poses a problem of interpretation. "There is," it says, "great interest with regard to what is the real norm on the number of hours permitted for credit in the canonical year. Interpretations of what is desirable vary widely." [1]

This statement is actually a question. The writer hopes to give a documented answer that will serve to orientate Supe-

[1] Report of *Everett Curriculum Workshop,* 1956, (Heiden's Mailing Bureau, Seattle, Washington), p. 3.

riors of women religious in preparing the program for the canonical year of novitiate.

Although generally speaking, what is said here applies also to novices aspiring to the priesthood or to the life of a brother in a technical career, the writer will address himself directly to women religious. This article is intended as an answer to the question of the Everett Report: What is the real norm about studies in the canonical year of novitiate?

The Novitiate a Time of Probation

The novitiate is a very old institution. A certain period of probation for aspirants has always been customary in religious institutes.[2] Not infrequently the novitiate was understood to be a religious house or a place of residence for the candidates to the religious life. But in reality it was more a state or condition wherein the candidate made possible a mutual test: The candidate would accept to live according to the rule and constitutions of the institute, thus obtaining first hand information about the religious life, while the institute would get acquainted with the qualifications and customs of the novice and could *prepare* him for profession.[3]

This norm marks the beginning of the early history of the present canonical law as stated in canon 565. It makes clear a point of great significance, that the novice as well as the institute has the right to get acquainted and to pass on their mutual suitability.

The Council of Trent [4] enacted the first law requiring a complete year of novitiate for the validity of the profession of regulars. Later on the practice of the Sacred Congregation of Bishops and Regulars extended the law to all institutes of simple vows, and finally incorporated the general practice in the *Normae* of the same Sacred Congregation, art. 72.[5]

[2] Augustine, *A Commentary on Canon Law*, ed. 4, III, 204.

[3] Cap. 16, X, *de regul.* III, 31.

[4] Sess. XXV, cap. 15 *de regul.*

[5] Cf. Wernz-Vidal, *De Religiosis*, (Rome, 1933), p. 231.

Pre-Code legislation, according to Wernz-Vidal,[6] was not very definite as to the nature of the experiment of the prescribed year of probation. It was enough that the candidate be in the state of probation, even when all testing and proving was omitted with the consequent harm for the novice and the institute.

From very early days, probation turned chiefly upon obedience and the capability of bearing the burdens of the religious life.[7] Although the Code of Canon Law does not describe in detail the particular exercises to be practiced in the novitiate, as Clement VIII did in his apostolic constitution *Cum ad regularem* of March 19, 1603,[8] it gives in canon 565 a rather substantial and practically complete program for the training of novices. The first paragraph states the purpose of the canonical year of novitiate: "The forming of the mind of the novice;" and then it explains how this end shall be attained, namely:

(a) "by means of study of the rule and constitutions;
(b) "by pious meditations and assiduous prayer;
(c) "by instruction in those matters which pertain to the vows and the virtues;
(d) "by exercises suitable for the rooting out of the germs of vice, for regulating the emotions of the soul, and for acquiring virtues."

Paragraph 2 of canon 565 fills up a possible gap in the religious training of lay novices, making it a law that they attend weekly conferences on Christian doctrine. Paragraph 3 forbids certain occupations which could easily become an obstacle to the realization of the purpose of the canonical year of novitiate, but which otherwise might appear commendable: "It is forbidden to employ the novices in the external duties of the institute, or in studies properly so called."

[6] *Ibid.*

[7] Augustine, *op. cit.*, III, 204.

[8] Cf. *Enchiridion de Statibus Perfectionis*, (Rome, 1949) I, 98.

All three paragraphs of canon 565 are intimately correlated, and only by a careful study of the entire canon is one able to obtain a correct idea about the law on studies during the canonical year of novitiate.

Paragraph 3 of this canon, where the explicit norms about studies are found, is a prohibitive or negative law. Negative laws are best understood in the light of the positive good or rights they are intended to protect.

For it is evident that all negative laws are inspired and justified by the good to be obtained thereby. In the present case the good to be secured is the proper formation of novices, as directed in paragraph one of canon 565. Therefore, this study must logically begin with the explanation of the positive norms contained in that canon, and then it should proceed to explain the text formulated in negative form.

Working for the Future

If there is need of youth anywhere in the world, it is in the novitiate. Young people live in the future; old people live in the past, in the good old days. The year of novitiate is entirely planned for the future, it is a time of training and preparation for what one must be and do later. The life in the novitiate is essentially the beginning, the initiation or commencement of a life to be lived until death. The most obvious consequence is that the novitiate is not to be organized as a type of life which will end with the year of novitiate, never to be lived again. Truly, indeed, many things a religious will be asked to do after profession cannot be part of the daily chores in the novitiate. It is the basic skills of the religious life as such that must be taught and practiced in the novitiate. The greatest mistake that can be made would be to water down the basic contents of the religious life by introducing elements which have no bearing on the true idea of the evangelical counsels as observed in the particular institute.

Since religious life is the life of the evangelical counsels, it is clear that it should be first and foremost Christ-centered.

The evangelical counsels derive their vitality, beauty and strength from Christ only. He explained the counsels with divine simplicity and power, and better yet, He found in them the perfect climate for God's life on earth. A novice must be trained to feel and practice the full impact of Christ in every aspect of his life, interior as well as exterior; He must be the source of inspiration for his entire religious formation. What is particular or characteristic of an institute must be like an accident predicated on the common basic factors of evangelical perfection. More emphasis on the basic elements not only will not render anemic the spirit proper of an individual institute; on the contrary it will make it more vital and beautiful with the life giving sap of the true vine that is Christ, and will bring out more powerfully the magnificent and divine solidarity of all the members of the Mystical Body of Christ.

The ideal of the formation of a religious leaves nothing unimproved. In order to form the best religious it is necesssary to form the best man and the best Christian. The best results in the religious life are obtained by training first the candidate as the perfect man and the perfect Christian. Such is the goal and objective of the training proposed in canon 565. By rearranging the canon one can present the following logical outline:

(a) Formation of the integral man by exercises suitable for the rooting out of the germs of vice and for regulating the emotions of the soul;

(b) Formation of the complete Christian by pious meditations and assiduous prayer for the acquisition of virtues;

(c) Formation of the perfect religious by means of study of the rule and constitutions and by instruction on those matters which pertain to the vows.

Here there is the complete Christ cut down to the size of the limitations and imperfections of the creature.[9]

[9] Cf. Adeodatus a S. T. a J. Infante, *The Training of Novices* in *Acta et Documenta Congressus Generalis de Statibus Perfectionis,* (Rome, 1950) vol. III, p. 92.

Immediate Goals

It seems evident that before anything else the novitiate should be dedicated to ascertain the existence of a vocation, as indicated by canon 538 when it says that the candidate must be "prompted by a right intention and fit to bear the burdens of the religious life." This is the first reason why the novitiate is a place of probation, both for the candidate and the institute.[10]

Candidates blessed with a vocation which they freely choose to follow are generally eager to live an ascetical life within the framework of the rules and constitutions of the institute to which they have been called. This is the duty which one's vocation makes easy, especially at the beginning of the religious life. Very wisely, therefore, canon 565 orders that the novices study the rule and constitutions. Youth today, in spite of its defects, has great enthusiasm for high ideals and is capable to understand and to practice a life of total donation. No one need fear that a clear and direct explanation of the exact ideas and ideals of the founder and of the first members of the institute will discourage the novices of today. It would be an injustice to them not to present for their study the religious ideal in its totality, at a level that requires heroism. They expect to be led, gradually of course, in their efforts to make progress in the fulfillment of the constitutions.

The story of a soul is the story of its relations with God, the story of its ascent in prayer. A religious is by profession a person completely involved in the things of God. And prayer is the best means to train for a life of constant relations with God. Novices "are to become accustomed to prayer and meditation so that they develop a familiarity with God." [11] Therefore, the novitiate is the best time to create the proper climate for a life of prayer. This climate must be entirely independ-

[10] Lenzetti, *The Study of Vocation* in *Acta et Documenta Congressus,* III, 108.

[11] *General Statutes of the Sacred Congregation of Religious* annexed to the Apostolic Constitution *Sedes Sapientiae,* (The Catholic University of America Press, 1957), art. 37, #1.

ent from outside factors. There is a danger of misunderstanding the nature of the climate of prayer. Externals can affect a man's ability to raise his mind and heart to God, but the essential conditions are all within; and it is this type of climate that one needs. Novices have to be taught to create such favorable conditions for prayer within, independently from the circumstances without. Beginners, and novices are expected to be beginners, will need a certain amount of exterior help in creating a favorable climate for prayer. It is possible that most people do not succeed in praying well until they find themselves in such a climate; while they are unacquainted with its reality and lack experimental knowledge of it they are unable to reproduce it on their own. Hence it is of great importance that novices be not burdened with academic or material work which would distract them from the main purpose of the novitiate. They must be led to experimental knowledge of what interior and exterior silence is and does for the soul. They are to be removed, possibly with a certain amount of natural repugnance on their part, from all contact with the things of the world. Novices will be best prepared to begin a life of prayer when their souls have tasted and experienced ease and readiness of soul, the undisturbed peace and quiet brought about by the silent atmosphere of the novitiate. The conferences and personal coaching of an experienced Master of Novices will then fructify a hundredfold.

These ideas on the nature of the novitiate have materialized in the comprehensive and substantial law of the Code. It has the wisdom of many years of experience as indicated by the footnotes to canon 565. These footnotes give as sources and historical background of this canon a papal document and three decrees of the Sacred Congregations. The papal document cited is Clement VIII's Constitution *Cum ad regularem,* March 19, 1603.[12] The decrees of the Sacred Congregations can also be found in the *Enchiridion: Sacra Congregatio* of the S. Congregation of the Council, September 21, 1624 (p. 111);

[12] *Enchiridion,* I, 98.

Ad explorandum of the S. Congregation of Religious, August 27, 1910 (p. 283); *Sacrosancta Dei Ecclesia* of the S. Congregation of Religious, January 1, 1911 (p. 309). No one need feel apprehensive about these norms having a stale air of antiquity that could spell out inadequacy for the needs of an age where the rules of accreditation and education in general have been steeped with the urgent need of efficiency and speed. As Larraona observes,[13] the codifiers left out whatever did not respond to the character of contemporary juridical norms. It is also worthy of notice that this canon was retained entire and intact in all the various drafts prepared during the period of codification; no changes were deemed necessary by any of the members of the commission for the codification. Furthermore, no one advanced any criticism concerning the wording of the canon. A unanimity of opinion reached at the very beginning of the time of codification is a guarantee of the wisdom and clarity of its contents and wording.

The now three and one half century old Constitution *Cum ad regularem* was for many years the Magna Charta for the training of novices. The content of canon 565 is principally taken from paragraphs 9-11 and 15 of the Constitution. This papal document begins with the statement that "the training of the novices is most useful and necessary in order to preserve and increase the regular discipline in religious houses," and that "nothing can lead faster to laxity than . . . carelessness in the education and instruction of the novices." In order to forestall any such possible harm in the future, the Constitution asks the Masters of Novices "to carefully seek to exercise the novices in the regular discipline, to teach them the importance and excellence of their divine vocation, in what the authentic and perfect observance of the vows consists, and how necessary is the keeping of the constitutions of one's institute." Beyond this, the Master of Novices is urged to teach the novices "vocal and mental prayer, the control of evil passions and habits by the use of the custody and mortification of

[13] *Commentarium pro Religiosis,* XXIV (1943) 209.

the senses, the avoidance of too much comfort, the practice of fasts and other corporal penances, purity of conscience and its frequent examination, the frequent reception of the sacraments especially of confession, the account of conscience, the exercise of humility by being occupied in menial works, modesty and continued silence" (paragraph 9). This norm is full of ascetical wisdom. Paragraph 15 warns against the neglect of the instruction in Christian doctrine of lay religious, a norm which paragraph 2 of canon 565 has incorporated into the Code of Canon Law. This part of the canon has reference also to one other source mentioned in the footnotes to the canon, the Decree of the Sacred Congregation of Religious, *Sacrosancta Dei Ecclesia.* The Decree of the Sacred Congregation of Religious *Ad Explorandum,* August 27, 1910, is mentioned in the footnote to paragraph 3 of canon 565. This document will be considered later.

Present Law

The Code of Canon Law gives every Master of Novices a magnificent program of action. The pity is that in most cases there is so little time to even initiate the work. This has moved many religious institutes to ask the Holy See for a second year of novitiate.

Paragraph 1 of canon 565 announces first of all the end and total purpose of the year of novitiate. The writer purposely uses the term *total* in order to give to the law its genuine meaning. Everything in the canonical year of novitiate must be directed precisely to that goal and purpose.[14] The mind of the S. Congregation of Religious about the nature of the year of novitiate was incidentally explained in a statement addressed to the Reverend Mothers General, September of 1952: "The Sacred Congregation permits the employment of novices in works of the institute, during the *second* year of the novitiate. This was a courageous step which at first sight seemed to be in open conflict with the fundamental spiritual purpose

[14] Cf. *Statutes,* Art. 36, #1, n. 2.

of the novitiate." [15] It is, therefore, of utmost importance for the understanding of the law to carefully examine the contents, as listed in the Code, of the purpose of the year of novitiate.

Larraona [16] interprets canon 565, § 1, as built entirely around the idea of vocation, and that seems to be the more common approach of commentaries to the canon, with slight or unimportant variations.[17] There are three steps to be taken in the novitiate if one is to achieve its goals. These steps may be taken simultaneously, for their differences are more theoretical than practical, as it will appear below. First, one must ascertain the existence of the religious vocation precisely to this institute; the next logical step is the formation of that vocation; the third step consists in exercising one's vocation. In the first step both the candidate and the institute are engaged in a vital search. The theology of vocation must be well known by those appointed to guide the candidate in his choice. And since, as a rule, they are members of the institute, they must have great reverence for God's will in order to be unbiased in favor of one's community especially when the will of God appears to be leading the candidate to another institute. This first step in search of one's vocation must not be understood in the sense that candidates begin their religious life as novices full of doubts and uncertainty, which often can be a source of much anxiety. The writer believes that the best guarantee, on the part of the candidate, of success in the novitiate and his entire religious life is to begin the novitiate with the intention and determination to serve God, generously and until death, in the particular institute one has entered. If and when God's will is shown to be different, there will be no harm and no difficulties for the candidate to follow it. On the other hand, great harm and spiritual loss will ordinarily follow from a candidate's attitude of uncertainty and hesitation often fos-

[15] Mimeographed notes.

[16] *CpR.*, XXIV (1943), 210.

[17] Cf. Schaefer, *De Religiosis*, p. 534, sq.

tered by lack of a sincere desire to give one's best to God. One who enters the novitiate half-heartedly, looks at the rules and constitutions as cumbersome and irrelevant. He who entertains doubts about his calling will waste much precious time trying to arrive at a decision, and will find the burden of the practices of the novitiate too irksome, for he must submit to something which he does not regard yet as his way of life out of love of God. He will hardly be able to look upon the spirit and traditions of the institute with love and affection. Such handicap is external and entirely unnecessary. This type of novices often lose their vocation, if they had one, or settle down for a mediocrity which is the tragedy in the life of possibly many religious.

A vocation needs to be given a definite form. The seed planted by God in the heart of the candidate has tremendous potentialities, but one cannot expect the candidate to have before his admission into the institute a clear understanding of the spirit of the founder and of the community, not even of the basic elements of a religious vocation which is identified with a life of the evangelical counsels. The forming of the candidate's mind will require to set him right, his mind and his will, and then to strengthen his will.

The third step is the exercise of one's vocation, namely, to live, as a beginner of course, a life which is intended to be the perpetuation of the life of the founder of the institute as imitator of Jesus Christ. It is not easy to be perfect; but the religious life does not require that one be perfect; it is rather a life of striving. One's will and ability to try to arrive at the perfection of the religious life responding to one's vocation is tested in the novitiate.

The probation and formation of the novices must have as foundation and support a clear knowledge of the rule and constitutions.[18] That is why the *Normae* (87 and 321) prescribed that a complete copy of the constitutions be given each novice at the very beginning of the year of novitiate. This obligation

[18] Larraona, *CpR.*, XXIV (1943) 210.

exists today, an opinion to which some canonists decline to subscribe.[19] The reason which supports the writer's opinion is based on the fact that in *The List of Questions* for the quinquenial report to be sent to the Holy See by Religious Institutes and Societies of Pontifical Right published in 1955, question number 165 reads as follows: "Did all the novices and each of them from the beginning of the noviceship have a complete copy of the Constitutions." The style of the Roman Curia (cf. canon 20) seems to be sufficient grounds to claim that there exists today an obligation to give each novice a complete copy of the Constitutions at the beginning of the year of novitiate. As a matter of policy this obligation is included in all the new constitutions when submitted for the approval of the Holy See.[20] This practice gives the novice an adequate opportunity to learn first hand the duties which religious profession will place upon him. Already in the XVI century a law was enacted to safeguard this prudent course of action: "The holy synod commands that the rule and statutes of the monastery in which young men wish to make their profession be read and explained to the same novices, so that they will not take their vows less prudently for lack of knowledge of the obligations contracted by profession." [21]

It is not easy to cover successfully in twelve months the splendid program outlined by canon 565 in its positive part for the canonical novitiate. Scholastic pursuits can easily elbow their way into an already crowded program. Any experienced Novice Master will be discouraged by the idea of giving the novices a regular program of academic studies with an array of appointed professors, text books to be studied or worse yet notes to be taken in class, papers to be written and examinations to be held. Even allowing for a perfect emotional and spiritual balance on the part of the novices, a formal academic

[19] Creusen, *Religious Men and Women in the Code,* Milwaukee, 1953, p. 151.

[20] Larraona, *CpR.*, XXIV (1943) 211.

[21] *Concilium Provinciale Cameracense,* 1565, Decreta, Tit. XIX, cap. XIV, in Mansi, XXXIII, 1419.

program can nullify their efforts to devote themselves seriously to the main work of the novitiate.

It might not be out of place to mention here another possible weakness in the program of the novitiate. Father Gounley puts it this way: "Not always are the intellectual attainments of the novice master sufficiently considered." [22] Father Fiocchi, the Jesuit professor of ascetical and mystical theology at the Lateran University, is of the same opinion.[23]

Since the purpose of this paper is to arrive at a practical, wise and constructive norm about the academic load to be considered legitimate in the canonical year of novitiate, it will not be improper to quote at some length the very pertinent remarks of Father Gounley regarding the intellectual content of the program entrusted by the Church to every Novice Master. He is more emphatic concerning clerical institutes, but his remarks are intended for all religious communities. "Where the novice master is not a theologian, the instructions and conference given will too often lack depth and solidity. They will only too often be but outpourings of sentiment and sentimentality and lack the solid basis of scholastic philosophy and theology which alone can assure a sane and sound asceticism. The effect of such conferences can hardly be salutary and enduring. Furthermore, if the novice master is not a theologian, there is great danger that he will be guided in the selection of his topics and in the development of his discourses by an unreliable norm of practicality, a practicality which does not consist in application of principles, but a practicality which is derived from generalizations based upon insufficient and undigested data of experience. As a result, his conferences and instructions will not form an organic unity and harmony of the spiritual life. A novice subjected week after week to such a haphazard exposition of the spiritual life will become confused and bewildered. He will be constantly changing the course of his efforts and at the conclusion of his novitiate he will still

[22] *The Formation of Novices* in *Acta et Documenta Congressus,* III, 99.

[23] Cf. *Acta et Documenta Congressus,* II, 160.

be uncertain as to where precisely lies the road to perfection." [24] However, it cannot be ignored that at times degrees or diplomas gained in recognition of academic endowments by a master of novices can be dispensed with without the training of the novices suffering thereby in the least. As Lenzetti says: "For God's sake do not disqualify for the office of master of novices one who is prepared to discharge well his duties, though he has never attended special courses for masters of novices." [25]

Paragraph 2 of canon 565 has no particular bearing on the issues discussed in this article, for it refers only to a class of religious for whom academic pursuits are entirely out of question. The term *"conversi"* of the canon does not apply to all lay religious indiscriminately, but only to those who in an institute with different classes occupy the last place and are dedicated to domestic work only.[26] For this class of religious a conflict of occupations because of academic pursuits is not likely to arise, neither is the clause regarding studies in § 3 applicable to them.

Lenzetti [27] recommends that the regular catechism classes prescribed for the lay religious be also given to cleric novices, for it often happens that they, too, lack clear ideas about the principles of Christian Doctrine.

In the case of novices being trained for domestic work, paragraph 3 of canon 565 forbids their being employed regularly in manual work, for that could interfere with their formation.

Studies *Dedita Opera*

Paragraph 3 of canon 565 is evidently intended to remove the obstacles which might prevent the fruitful and efficient realization of the program for the time of novitiate established in paragraph 1. "The principle to be followed is the avoidance

[24] *Acta et Documenta Congressus,* III, 99-100.

[25] *The Training of Novices* in *Acta et Documenta Congressus,* III, 111.

[26] Cf. Larraona, *CpR.,* VIII (1927) p. 172, note 493, and XVI (1935) p. 152.

[27] *The Study of Vocation* in *Acta et Documenta Congressus,* III, 108.

of any form of activity that would be detrimental to the acquisition of religious virtue." [28]

The pertinent part of paragraph 3 states: "During the (canonical) year of novitiate, the novices must not be employed in preaching . . . or even, (of set purpose) in the study of letters, the sciences or arts . . ." [29] The words in parenthesis have been added by the writer. "Canonical" is not in the Latin text, but is added here to clarify the extent of the law. That canon 565 applies only to the canonical year of novitiate is admitted by all.[30] To what extent the general prescriptions of the Code regarding the novitiate apply to the second year of novitiate is not considered in this article.[31] "Of set purpose" is added to bring the authorized English translation closer to the official Latin text which reads, *"dedita opera."* This phrase is of particular interest and significance in the law under consideration, and it seems rather unfortunate that it was left out in the authorized translation. It is equally unfortunate that the sole official English text of the *Statutes* translates *dedita opera* as follows: "Of one's own accord." [32] This translation distorts the meaning of the canon beyond recognition. *Harper's Latin Dictionary,*[33] v. *opera,* gives the proper translation: "II. Transf. A. *Care, attention, exertion* bestowed on anything: *dedita opera, seriously, with a purpose,* Plaut. Trin. 1, 2, 29."

Abbo-Hannan [34] translate *"dedita opera"* by the phrase "as to a task;" Augustine [35] translates it as the authorized English

[28] *Review for Religious,* VII (1948) 271.

[29] *Canonical legislation concerning religious,* Authorized English Translation, The Newman Press, 1953.

[30] Cf. canon 555, § 2; Larraona, *CpR.,* XXIV (1943) p. 210.

[31] Cf. question 175 of *The List of Questions* for the quinquennial report.

[32] Art. 36, § 1, n. 2.

[33] American Book Company, New York, 1907.

[34] *The Sacred Canons,* I, 582.

[35] *Op. cit.,* III, 241.

translation quoted above; Bouscaren-Ellis [36] and Creusen [37] translate it "in studies properly so called." It is particularly interesting to notice that the translation given in *The List of Questions* for the quinquennial report prepared by the Sacred Congregation of Religious (1955), question 175, reads as follows: ". . . or did they apply themselves expressly to the study of literature. . . ."

Before one enters into the exegesis of paragraph 3 of canon 565, it will help to remember a basic principle of interpretation. Canonists are unanimously agreed as to the substance of the theory of interpretation which defends that the law is what the legislator wished, namely the law is the will of the legislator and not the will of the law considered as an independent entity standing by itself and even growing and expanding aside from the will of the legislator.[38] This is called the subjective theory of law. Although there is a variety of opinions as to the criteria to be followed in the subjective theory of law, it is generally accepted in Canon Law circles that in the exegesis of canonical norms, the text or verbal formula has priority over the reasons for the law.[39] This explains the strong loyalty of interpreters to the letter of the canons, until another factor or criterion of interpretation recommends a departure from the obvious literal meaning of the text and the context.

The minimum requirements of the norm stated in paragraph 3 of canon 565 is that the canonical year of novitiate shall not be a time of academic pursuits. The idea is not new in the Church. As far back as the XIV century one finds a Roman Pontiff stating his opinion and making it a law. "They shall not apply themselves to scholastic studies during

[36] *Canon Law,* ed. 2, p. 268.

[37] *Op. cit.* p. 151.

[38] Cf. Cabreros, *Investigacion Subjetiva y Objetiva de la Ley* in *Investigacion y elaboracion del Derecho Canonico,* Barcelona, 1956, p. 215.

[39] Cf. canon 18.

the time of novitiate or probation." [40] During the pontificate of Pius IX the Vatican Council clearly instructed the competent superiors about the care and training of novices and prescribed that they should not be employed in studies. "Since the training of novices is directed to the laying of the foundations of their spiritual life, they shall not dedicate themselves during the year of novitiate to study except the constitutions and spiritual books most apt and useful in the judgment of the master, adding also some reading and explanation of the Roman catechism." [41]

It is the common opinion of canonists that some study is permitted and useful in the canonical year of novitiate. Although Regatillo [42] and Romani [43] seem to maintain that no studies whatsoever may be permitted in the novitiate, it must be presumed that their text, "no formal course of studies" and "no other studies" respectively, and context is too brief to know what they believe to be the interpretation of the law. Oesterle,[44] however, leaves no room for doubts about his interpretation of the law. He briefly says that novices may not follow any course of philosophy, theology, etc.; if there be any need to do so, a dispensation should first be obtained. In passing it could be mentioned that whenever a dispensation from canon 565, § 3 is needed, no authority except the Holy See itself can dispense from this law.[45]

The more strict interpretation of the law given by the above mentioned canonists should not be considered to be in conflict with the common opinion of canonists who have studied this canon more in detail.

[40] Apostolic Constitution *Redemptor Noster* of Benedict XII, dated November 28, 1336, addressed to the Order of Friars Minor, in *Enchiridion*, p. 42.

[41] Vatican Council, *Schemata Constitutionum de Regularibus*, n. 6, ch. V, in *Enchiridion*, p. 202.

[42] *Institutiones Iuris Canonici*, (ed. 4, Santander, 1951), I, 483.

[43] *Institutiones Iuris Canonici*, (Rome, 1941), I, 367.

[44] *Praelectiones Iuris Canonici*, Manuscripti Instar, Rome, 1931, I, ad c. 565, #3.

[45] Creusen, *op. cit.*, p. 152.

Larraona[46] gives an excellent explanation of the canon. Practically all the canonists who have written on this matter agree with him. He states that canon 565, § 3 forbids, a) regular and methodical academic courses directed by a teacher, and b) prolonged private study of literature, science and arts for the purpose of advancing in their knowledge. The content of the three subjects mentioned is rather broad. Literature includes languages, the reading of the classics, cultivation of literary style, and the like. Science refers not only to physical and natural sciences, but also to philosophy, jurisprudence, moral and dogmatic theology, and other similar subjects. Arts means the study, even in a broad sense, of skills and appreciation in conformity with aesthetic principles; it does not include a merely mechanical exercise.[47]

The law is negative in form, yet, it is the common opinion that it allows some study.[48] There is a variety of opinions regarding what is permitted in the novitiate concerning studies. Some writers are preoccupied with making it clear that any study in the novitiate has to be something secondary in the life of the novices.[49] This is evidently the minimum requirement of the law regarding the amount of studies permitted in the novitiate. As Creusen says: "Even independently of the express law of the Church (c. 565, § 3) there are two good reasons for such course of action: the strict right of the aspirants to receive a solid formation in the religious life; and secondly, the good of the institute, which requires in its members solid

[46] *CpR.*, XXIV (1943) 214-215.

[47] Larraona, *ibid.*, p. 215.

[48] Cf. Creusen, *op. cit.*, p. 152; Lenzetti, *Acta et Documenta Congressus*, III, 108; Vermeersch, *Epitome*, (1933) I, 509; Wernz-Vidal, *op. cit.*, p. 244; Tabera, *Derecho de los Religiosos*, (ed. 2, Madrid, 1952), p. 302; Abbo-Hannan, *op. cit.*, I, 582; Beste, *Introductio in Codicem*, (ed. 2, Collegeville, 1944), p. 377; Choupin, *Nature et Obligations de l'Etat Religieux*, (Paris, 1923), p. 279; Prümmer, *Manuale Iuris Canonici*, (Freiburg, 1927), p. 281; Chelodi, *Ius Canonicum de Personis*, (ed. 3, Trent, 1942), p. 423, note 2; Coronata, *Institutiones Iuris Canonici*, (ed. 2, Rome, 1939), I, 730, note. 6.

[49] Wernz-Vidal, *op. cit.*, p. 244; Tabera, *op. cit.*, p. 302; Vermeersch, *op. cit.*, p. 508.

virtue and a true interior spirit." [50] If a course of studies is likely to interfere with the success of the year of novitiate, that course should be discarded, not necessarily because of the norm given in § 3, but because of the precepts of § 1 of canon 565.

Today's more pressing need of an intellectual and academic formation for Sisters cannot be allowed to impede in the least what is basic and paramount in the life of the evangelical counsels. The expansion of the facilities for technical training should never be permitted to detract from the time, effort and other requirements that belong in a well organized program of spiritual training on the novitiate level. No school will allow students to carry an academic load beyond certain reasonable bounds. Any combination of academic and spiritual duties on the novitiate level which clash and interfere with the main purpose of the year of novitiate, as understood by the Church, is forbidden. If Sisters are to be solidly grounded in the principles of the spiritual life, one wonders when it takes place. Of late there seems to be a greater demand that retreat masters explain the fundamentals of spiritual life. One might wonder how little Sisters are taught about the spiritual life in the novitiate. It is evident that even the most spiritually intense year of novitiate, one which is a hundred per cent successful for both the individual and the institute, will produce very limited results and will only be the beginning of a life of striving after perfection, not only as to holiness or the habit of charity, but also as to the intellectual maturity that it presupposes. No part of the job which the Church wishes to be accomplished during the year of novitiate can be relegated to a later time. Some women religious, and men too, only after long years, if at all, find out just what religious life is all about. This need not be so.

Study and Spiritual Life

A certain amount of study is useful and perhaps necessary to help make the year of novitiate spiritually successful.[51]

[50] *Op. cit.*, p. 152.

[51] Cf. Lenzetti, *op. cit.*, p. 108; Beste, *op. cit.*, p. 377.

Variety is needed to sustain the effort without a lapse into the boredom or irritation caused by monotony.[52] As a rule novices need somewhat long periods of relaxation every week. Besides sufficiently long physical exercise adapted to the age and temperament of the novices, Gregorian chant, modern music, liturgical instruction, and the reading of good books, is strongly recommended by Lenzetti.[53]

Ellis states that the reasons for allowing any study at all in the novitiate are to help the novices retain the knowledge they have already acquired, and to add a certain amount of pleasant variety to the regular order of spiritual duties and exercises, thus helping them to avoid any overstraining of the nervous system which may result in physical or mental exhaustion, and may manifest itself in scruples or melancholia." [54]

Study can be a relaxing or a taxing occupation. When novices find even a limited time of study too taxing it might be a symptom of some academic deficiency which occurred before the novitiate. It is possible that candidates for the religious life lack, when they start the novitiate, a proper habit of study; they might lack interest in the pursuit of academic goals. One who is of age to enter the novitiate and who aspires to a career should be able to find a certain amount of study relaxing from the intense spiritual program of the novitiate. Furthermore, novices who are going to pursue an intense and more or less long course of studies after their first profession need a good habit of study. It does not seem to ask too much to require that novices pass to the house of studies with more than a fair amount of good will to try. However, the writer disagrees in principle with the opinion that studies in the novitiate are justified in order that the Superiors may have an opportunity of testing the talent of the novices, in the sense of academic ability.[55] It is true that several documents

[52] Creusen, *op. cit.*, p. 153.

[53] *Op. cit.* p. 108.

[54] *Studies during the novitiate* in *Review for Religious*, II (1943), 262.

[55] Cf. Abbo-Hannan, *op. cit.*, I, 582.

from the Holy See indicate that the novitiate can serve the purpose of knowing the candidate better.[56] The writer's objection is raised mainly against making the novitiate a kind of academic test. In the case of a novice aspiring to the priesthood it would seem a very incongruous situation were he to be denied admission to his first profession on the grounds of lack of intellectual capacity. The novitiate made as a cleric is not valid for another class; and besides a cleric novice is not expected to apply himself of set purpose to studies; his main goal must be spiritual religious formation. However, as assumed in the case, he is deemed unworthy of admission only because he is not successful in his studies during the canonical year of novitiate. Such an attitude on the part of the Superiors would be contrary to the mind of the Church. The school record submitted before admission to the novitiate should settle the matter of the novice's intellectual qualities until the first profession is made and the young religious applies himself to full time studies. This doctrine applies generally to Sisters, also. On the other hand, the studies permitted during the year of novitiate could and should enable the superiors to know the candidates better. In this sense the novitiate can indeed offer an opportunity to test the talents of the novices.

On the feast of St. Joseph, March 19, 1924, Pius XI issued an apostolic letter, *Unigenitus Dei Filius* [57] addressed to every Superior General of institutes of men religious. The document is mainly concerned with the formation of their members in a higher culture. Speaking of the year of novitiate, the Holy Father says that the candidates "shall learn, of set purpose, the fundamentals and the virtues of the religious life; . . . therefore, putting aside the study of any subject matter and any pastime, the novices, under the wise guidance of their master, shall apply themselves only to the practice of the interior life and to the acquisition of virtues especially those related and connected with the religious vows, namely of poverty, chastity and obedience."

[56] Cf. Decretum *Ad explorandum* in *Enchiridion,* p. 283.

[57] *Enchiridion,* pp. 400-413.

Coronata,[58] Schaefer,[59] and Wernz-Vidal[60] take notice of Pope Pius XI's apostolic letter. Wernz-Vidal seem to prefer an interpretation of canon 565, § 3, which is entirely in agreement with the letter of the papal document. Therefore, according to them, all directed studies are forbidden in the novitiate. Coronata and Schaefer believe that Pius XI's letter can be interpreted to allow some academic activities. Most canonists omit to mention Pius XI's *Unigenitus Dei Filius* when commenting on canon 565. The reason for the omission may be that the apostolic letter does not change the law nor explain it; it is an emphatic re-statement of doctrine commonly accepted. Pope Pius XI brilliantly summed up in a few words the basic norms on the novitiate stated in various parts of the Code of Canon Law.

A literal interpretation of paragraph 3 of canon 565 throws little light upon what the Church considers a legitimate practical positive norm about studies during the year of novitiate. The canon is negative, and its interpretation hinges around the meaning of *dedita opera* (of set purpose). The variety of opinions on this point justifies what the Everett Report says: "Interpretations vary widely." Yet the differences of opinion are not as great as it might seem. One may venture to say that they are more apparent than real.

THE DECREE *Ad Explorandum*

Canonists are practically agreed on the following points:

(a) Some study during the year of novitiate is useful, advisable and in keeping with the norms of the Code of Canon Law;

(b) Study should never be permitted to interfere with the primary purpose of the year of novitiate (canon 565, § 1);

(c) The Code offers no positive norm about the subject matter or manner of studies in the novitiate;

[58] *Op. cit.*, p. 730, note 6.

[59] *Op. cit.*, p. 539.

[60] *Op. cit.*, p. 244, note 35.

(d) Pre-Code laws, especially the decree of the Sacred Congregation of Religious *Ad Explorandum,* August 27, 1910 (*Fontes,* VI, 4405), were abrogated by the Code of Canon Law;

(e) The decree *Ad Explorandum* is a safe interpretation of canon 565, § 3.

(a), (b) and (c) have already been explained above. It remains to discuss the contents and the validity of the decree of the Sacred Congregation of Religious.

Most canonists expressly recognize the existence and importance of this decree in the matter of studies in the canonical novitiate.[61]

The first paragraph of the decree emphasizes the fact that the canonical year of novitiate is established for the purpose of searching one's soul and educating it gradually in the ways of religious perfection. "Therefore, the year of novitiate is to be totally dedicated to spiritual practices."

The decree, which appeared prior to the Code of Canon Law, is in perfect agreement with the canons in establishing the total object of the year of probation. This statement is important and should allay all the apprehensions of canonists who might be inclined to see a conflict between the norms of this decree and those of canon 565. At the time of the codification there was a relatively strong opposition on the part of some canonists to the decree. They wanted to have it revoked and not to include it in the footnotes. Yet, in spite of the opposition the decree is mentioned as a source for paragraph three, and has been up to the present considered by the Sacred Congregation of Religious as a safe practical criterion in the application of the canonical norms on studies in the novitiate. The statutes appended to the Constitution *Sedes Sapientiae* (art. 36) once again mention the decree *Ad Ex-*

[61] Cf. Prümmer, *op. cit.,* p. 281; Choupin, *op. cit.,* p. 279; Vermeersch, *op. cit.,* p. 509; Tabera, *op. cit.,* p. 302, note 55; Chelodi, *op. cit.,* p. 423, note 2; Creusen, *op. cit.,* p. 152; Larraona, *op. cit.,* p. 215; Beste, *op. cit.,* p. 377, note 17; Schaefer, *op. cit.,* p. 539.

plorandum as a safe practical norm to be followed regarding studies in the canonical year of novitiate.

Returning to the text of the decree, one finds next that the document reports on the findings of experience, namely that the continuous practice of spiritual exercises, even when opportune variations are introduced, tires the mind especially of young people, and, as a consequence, they quite often approach those exercises with a fatigued mind and a less attentive will. Furthermore, a certain amount of directed studies during the year of novitiate can well serve to avoid forgetting what was previously learned and besides to prove one's intellectual capacity, aptitiude and diligence.

The practical norms of the decree, which were of a mandatory nature, may be stated briefly as follows:

1. Novices shall devote one hour a day to private study, except on feast days;

2. It is best to have competent teachers in charge of the studies. They shall lecture for an hour, or at least check the progress made in the subjects assigned, but no more than three times a week. This is over and above the daily hour of private study;

3. Although the novitiate is not an (academic) school in the true sense of the word, the lectures and private study mentioned above, should not be held just as a practice of mortification. The novices shall apply themselves diligently and shall seek a corresponding improvement. Teachers shall follow the proper method, shall try to find out the ability and application of the novices, and shall see to it that they make progress. The kind of studies to be pursued depends on the nature of the institute. The vernacular for all, and Latin and Greek for those aspiring to sacred orders are recommended, besides some practice of composition and recitation.

It is the common opinion today that the decree no longer binds.[62] As Choupin writes [63] canon 565 does not incorporate

[62] Cf. Larraona, *CpR., ibid.*, p. 215.

[63] *Op. cit.*, p. 279.

to the Code of Canon Law the prescriptions of the decree *Ad Explorandum*. Yet it is legitimate and perfectly safe to interpret canon 565, § 3, according to the norms of the decree.[64] The norms of the decree may well serve as a guide for superiors when formulating the time table for the novitiate.[65] The decree is an excellent directive norm.[66] The excellent reasons for the decree *Ad Explorandum* exist also at present, and therefore superiors should feel that they must organize the program for their novitiate in keeping with the mind and spirit of the decree.[67]

Among the outstanding canonists who do not seem to endorse the opinions of the authors just quoted must be mentioned Schaefer and Coronata. However, these two well known canonists suggest as a practical norm precisely what the decree had commanded in the year 1910. Therefore, even if in theory they refuse to accept the decree as a guide for the interpretation of canon 565, § 3, in practice they follow it.

Some canonists will limit the studies allowed during the year of novitiate to review only.[68] It would seem, however, that such restriction is not justified. The purpose of review is not to forget. Now, although the effort needed not to forget is lesser than the effort needed to learn new things, it is evident that the study of more advanced material is a successful means both to review and help remember and to make new progress. As a matter of fact review implies having forgotten something or not having understood it right. Review of things known can be extremely boring and very little conducive to the very purpose of studying, whether it be in the novitiate or outside

[64] Larraona, *Ibid.*, p. 215.

[65] Choupin, *op. cit.*, p. 280.

[66] Prümmer, *op. cit.*, p. 281; Tabera, *op. cit.*, p. 302, note 55; Chelodi, *op. cit.*, p. 423, note. 2.

[67] Vermeersch, *op. cit.*, p. 509; Creusen, *op. cit.*, p. 152; De Carlo, *Ius Religiosorum*, (Tournai, 1950), p. 214.

[68] Cf. Tabera, *op. cit.*, p. 302; Abbo-Hannan, *op. cit.*, p. 582.

the novitiate. Goyeneche [69] gives the more liberal interpretation about this point. He is of the opinion that new subject matter can be studied, although no formal course should be had. Regarding new matter, Regatillo [70] allows only *"leviora discere"* (to learn the less important or easier things).

Canonists who attempt to give a norm about the subject matter to be studied in the novitiate must of necessity suppose that it is not a simple matter of review; or else there is no point in trying to choose the subject. This view adopted by the writer seems to find support in the *Statutes.* After stating that classes in the novitiate itself are not forbidden, the statutes add: "Nevertheless, these are not to be computed in the school year." [71] This exception can be understood only if studies are not limited to review. A course of studies which consists exclusively in the review of matter previously studied is generally given no academic recognition; it might be called a remedial course, but constitutes a duplication which no program of studies is wont to consider as part of a school year.

At first sight the prescriptions of canon 565, § 3, appear to be much more strict and restricting than the norms of the decree *Ad Explorandum.* But by interpreting the canon in the light of the decree one achieves an equitable norm. Equity as an aid to interpretation can be a right use or an abuse. It is an abuse, which cannot be tolerated, when equity is used to replace an existing law which happens possibly to be less perfect or somewhat difficult to observe because of the consequences. The right use of equity limits itself to avoiding the evident harm that would follow from the strict demands of logical reasoning in the interpretation of the law.[72] Concerning the interpretation of canon 565, canonists find the equitable norm by retaining the existing law in all its vigor as con-

[69] *Iuris Canonici Summa Principia,* Pars II, *De Religiosis,* (Rome, 1938), p. 103.

[70] *Op. cit.,* p. 483.

[71] Art. 36, § 1, n. 2.

[72] Cf. Bender, *Logica et Legis interpres,* in *Investigacion,* p. 274.

tained in paragraph 1, making the purpose of the year of novitiate a total and engaging goal, eliminating all obstacles, as directed in paragraph 3, yet maintaining a well balanced spiritual and intellectual diet for the young novices.

Practical Norm

Canonists have used slightly different formulas to state what they think is the practical norm as contained in the Code of Canon Law. All the formulas may be grouped as follows:

Beste [73] and Abbo-Hannan [74] allow one hour a day of study on week days; they are not clear as to whether it is private study only or classes conducted by a professor.

Coronata,[75] Schaefer [76] and Jone [77] allow three or four hours a week of lectures or classes conducted by a professor.

Creusen [78] allows one hour a day of instruction. The term "instruction" seems to indicate a class conducted by a professor.

Choupin [79] is rather vague, for he allows a "certain amount of time of study."

Lenzetti [80] permits three or four hours a week of study. He says nothing about the study being under the guidance of a teacher.

Ellis [81] says that "in place of three periods of sixty minutes each, it may be found more convenient to have four class periods per week of forty-five minutes each."

Tabera [82] allows an hour a day of private study and some few classes a week:

[73] *Op. cit.*, p. 377.

[74] *Op. cit.*, p. 582.

[75] *Op. cit.*, p. 730, note 6.

[76] *Op. cit.*, p. 539.

[77] *Commentarium in Codicem Iuris Canonici*, (Paderborn, 1950), I, 491.

[78] *Op. cit.*, p. 152.

[79] *Op. cit.*, p. 279.

[80] *Op. cit.*, p. 108.

[81] *Studies during the Novitiate* in *Review for Religious*, II (1943), 261.

[82] *Op. cit.*, p. 302.

Larraona [83] allows:

(a) some private study with moderation,

(b) some few lectures a week,

(c) a limited practice of art or skills provided it does not interfere with the exercises of the novitiate.

The writer chooses as the most acceptable practical norm a combination of Tabera's and Larraona's formula:

An hour a day of private study on week days;

Five or six lectures a week by a competent professor.

This norm extends the number of lectures prescribed by the decree *Ad Explorandum* in keeping with the present mind of the Sacred Congregation of Religious. According to the *Statutes,* ". . . there is no prohibition of . . . brief, even daily, classes in the novitiate itself." [84]

Some vocal or instrumental music practice in common two or three times a week has been found very practical in the past.[85] It serves for relaxation and adds to the solemnity of the liturgical services. Some private instrumental music practice, painting or clay modeling, and the like is permitted according to the prudent judgment of the Master of Novices, provided it does not interfere with the common practices of the novitiate.

The length of time that can be dedicated expressly to the study of literature, science or humanities does not seem to have been measured exactly by the law. Therefore, it remains subject to the prudent judgment of the superiors responsible for the schedule of the novices. Question 175 of *The List of Questions* implies the existence of some norms given by the Sacred Congregation, but that information does not seem to be public. The question reads in part: ". . . did they (the novices) apply themselves expressly to the study of literature, science or humanities (c. 565, § 3) beyond the limited measure

[83] *CpR., ibid.,* p. 214.

[84] Art. 36, § 1, n. 2.

[85] Cf. *Review for Religious,* VII (1948), 271.

in which this has been approved by the Sacred Congregation?" The writer has no specific information on this point; but, according to a reliable source, the norms are more or less those of the decree *Ad Explorandum*.

Regarding the subject matter of the academic studies permitted within "limited measure" nothing was said in the *Normae* of the Sacred Congregation of Bishops and Regulars of June 28, 1901. According to several canonists [86] only the following subjects were permitted: one's native tongue and Latin in institutes that use this language in the classroom or choir. Abbo-Hannan [87] and Beste [88] very properly consider the advisability of pursuing also other studies, "depending on the nature of the institute," such as theoretical nursing, for instance. Lenzetti [89] mentions music and liturgy. Tabera [90] seems to allow only the review of studies completed previously. Larraona [91] speaks of review and further development of studies taken up in high school. Choupin [92] allows "studies which will help the novices to better respond to their vocation and to discharge successfully the offices or work to which the institute is dedicated." The *Statutes* mention Sacred Liturgy, not as a selective, but as a compulsory subject for study during the year of novitiate: "In the novitiate . . . they are to learn the Sacred Liturgy and live by it" (Art. 37, #1).

Each one of these opinions tells just part of what the decree *Ad Explorandum* had prescribed. The document states first of all this wise rule: "The kind of studies to be taken up depends on the nature of the institute." Then it mentions one's native tongue, Latin, Greek, composition and recitation.

[86] Creusen, *op. cit.*, p. 152.

[87] *Ibid.*

[88] *Ibid.*

[89] *Ibid.*

[90] *Ibid.*

[91] *Ibid.*

[92] *Ibid.*

In this connection the writer feels that Ellis' opinion [93] is narrower than required by the law. Ellis discusses three practical cases, as follows: "It does not seem to be in keeping with the mind of the Church for a novice to *begin* the study of a modern language. Ten or fifteen minutes of setting up exercises daily will prove helpful to all novices, provided these exercises are given for reasons of health, and not to impart the science of physical education. As to fine arts, they have no place in the novitiate curriculum. Specially gifted novices who have had considerable previous training might be allowed a moderate amount of *practice* in music or drawing during the *second* year of novitiate." In the first case Ellis must rely on the opinion which refuses to allow any new studies in the novitiate. However, the present norms of the S. Congregation of Religious give a less restricted interpretation, as it was explained above.[94] In the case of setting up exercises it seems unreasonable to demand that the reasons of health be disassociated from the practical knowledge one can possibly obtain. That one learns a science by exercise intended for one's health cannot be justification to demand that the exercises be discontinued. As to fine arts, it is generally recognized that practice at the piano or organ, for instance, is permissible not only during the second year of novitiate, but also during the canonical year.[95]

Another important aspect of the studies in the canonical year of novitiate is final examinations and credits. The *Statutes* declare expressly that classes given during the novitiate are not to be counted as part of the school year (Art. 36, § 1, n. 2). This prescription, the Statutes add, is to be understood according to the norms of the Sacred Congregation. As a source of reference, it then quotes in a footnote the decree *Ad Explorandum* of 1910.

[93] *Studies during the Novitiate* in *Review for Religious,* II (1943) 261.

[94] Cf. *Statutes,* Art. 36, § 1, n. 2.

[95] Cf. Larraona, *CpR.,* XXIV (1943), p. 214.

From a psychological point of view or considering the effect it may cause on the attitude of novices, there is a great difference between a program of studies intended just to keep their minds occupied and to enrich them with useful information, and a program fortified with the pressing demands of final examinations, marks to be given and credits to be granted. Not only youth, but any conscientious individual easily feels the gripping pressure brought about by the responsibilities of a regular course of studies. It is not easy to disregard the high value placed nowadays on efficiency. A novice might not be too concerned or preoccupied about whether he knows how to make the meditation well or whether he applies himself intensely to prayer; but he cannot escape the consequences of low or failing marks. Besides, there seems to be no difficulty in admitting that lectures and classes of a purely academic type require more concentration and effort than the spiritual instructions of a Novice Master. Choupin does not mention the term examinations, but his mind seems to be preoccupied with the responsibilities which regular academic courses imply. He says that "novices should not apply themselves to any absorbing work directed to their literary, scientific or artistic training which, for instance, binds them to follow regularly certain courses, as students do, something in the nature of strict duty, a preoccupation little compatible with the purpose of the novitiate. That preoccupation could easily prevent the novice in a greater or lesser degree from giving himself fully to the practices proper of the year of novitiate, with the consequent harm to his religious formation." [96] Creusen is more explicit. He plainly states that "study must never become an end in itself, nor should its principal purpose be a preparation for examinations." [97]

The American policy in the choice of studies in the novitiate has been guided by a very strong theological orientation.

[96] *Ibid.*, p. 279.

[97] *Ibid.*, p. 153.

Now, the fact that the program of studies in the novitiate is prepared with scrupulous emphasis on topics closely related to the intellectual aspect of the canonical program is likely to be even more taxing on the mind and will of the novice. A program of a more secular character would in many cases be more relaxing. The study of the sciences as visualized by the decree *Ad Explorandum* was intended as a relaxation based principally on variety. Therefore, it is not enough to consider the amount of time spent in organized studies; the nature of the topics studied is also of great importance. A constant occupation of the mind with theological studies, at times for one's spiritual advancement, at other times for one's academic progress, can become extremely tiresome for young people. They may reach a point of saturation of sacred subjects, while secular studies would be most welcome as a measure of legitimate relaxation. Up to the present the Holy See has not shown preference for the study of sacred sciences in the novitiate. All and any of the subjects studied before admission to the novitiate are considered equally acceptable for review. No distinction is made between sacred and secular subjects.

As of today the law is that no examinations shall be taken of the studies made during the canonical year of novitiate and no credits given. This much is clear from the prescriptions of the Code of Canon Law and the *praxis* of the Sacred Congregation of Religious, which is supposed to prevail over the common opinion of the canonists.[98] The meaning of *dedita opera* of canon 565, § 3, should at least mean that no test is given to the novices for their studies or else they should be bound to dedicate themselves, as to a special task, to a certain amount of study. The Sacred Congregation of Religious officially follows the principle that no formal examinations are held and no credits given for studies completed during the novitiate. In its efforts to perfect as much as possible the present legislation on the training of religious, the S. Congregation is engaged in the preparation of more definite and specific norms which will

[98] Cf. canon 20.

regulate also studies during the canonical novitiate. These norms will settle authoritatively some of the points discussed by the writer.

Expansion and Orientation

Having stated clearly what is the law about examinations and credits during the year of novitiate, the writer wishes to proceed to respectfully submit a few suggestions.

The importance of the decree *Ad Explorandum* as a practical norm for the interpretation of canon 565, § 3, cannot be questioned today, for three reasons:

1. The decree was retained in the footnotes of the Code of Canon Law as a source of § 3, in spite of the opposition. Therefore, according to canon 6 the decree is a valid guide for its interpretation.

2. Question number 175 of *The List of Questions* for the quinquennial report of religious implies the existence of certain norms issued by the Sacred Congregation. These norms are more or less the ones contained in the decree *Ad Explorandum.*

3. The Statutes appended to the Constitution *Sedes Sapientiae* give as the only reference to explain the phrase, "according to the norms of the Sacred Congregation" (Art. 36, note 42), the decree *Ad Explorandum.*

With the decree as a guide, one may safely venture into the consideration of the possibility and practicality of a course of studies that would culminate in formal examinations during the year of novitiate.

The decree *Ad Explorandum* (n. 4) directs the persons responsible for studies in the novitiate to keep a written record of the application and progress of each novice, and to send to the higher Superiors a written statement of this record. It is obvious that in order to obtain sufficient information on the diligence and progress of each novice, some kind of test, be it oral or written or both, is necessary. Therefore, if the norms of the decree are followed by superiors, examinations are not

only permitted, but seem to be a necessary means to avoid doing an injustice to the novices whose report is given.

It is possible that the strongest objection raised in the past to the decree *Ad Explorandum* was based on the pressure examinations are likely to put on the novices. The writer has already admitted above that a certain amount of pressure is produced by examinations. However, if some organized studies are permitted, no one can reasonably object to a prudent test of the progress made by the novices. It seems to the writer that the only test of sufficient significance are examinations of one kind or another. Such test is the only public reliable guarantee of proper application to academic studies in the novitiate. Furthermore, the nature and occupations of the early religious life of most men and women is characterized by the serious responsibilities of a full time student. It was stated above that the life in the novitiate is to be considered in the light of the future life; the novitiate is a time of probation for the future. A limited and wise choice of academic responsibilities in the year of novitiate should be very helpful to develop the right attitude in the novices concerning what will be for a number of years, perhaps for their entire life, a sacred duty: Study. A complete divorce between studies and spiritual life in the novitiate for a person dedicated to a career might well develop in his mind a dichotomy between the two types of pursuits which will never be overcome by a balanced blending of the two.

Assuming then that a limited number of classes are normally conducted as part of the program of the year of novitiate and examinations given as an integral part of a legitimate plan, it seems that no one could be justified in objecting to another step. What reason could there be to deny all possible recognition for work done, and therefore, that classes be recognized and credited and the novices be given their marks and credits? Then a limited academic course could reasonably be considered as part of the general program of academic training of Sisters. The writer admits that his opinion means an innovation; the intervention of the competent authority would be

needed to allow such practices. Experience has proved that such innovation would be beneficial and welcome, with almost moral unanimity, by religious superiors. It is possible that custom has already "undermined" the existing law badly enough to give such practices a semblance of legitimacy. The actual practice in America, according to the Everett Report about women religious, varies. "In some cases the number of credit hours per semester is as high as 16; the average, however, is around seven credit hours per semester." [99] The report speaks beyond all doubt of the year of novitiate, for it says: "In the canonical year of novitiate, the variation (of the number of credit hours per semester) is from zero to 16." [100] Sister Bertrande has described the situation in very strong terms: "They (the novices) are robbed of their canonical year with a full program of studies." [101] Here would seem to apply in a certain degree the observation of Lenzetti: [102] "I wish that this law (canon 565, § 3) were always kept, especially in institutes of religious women, where the novices, at times, spend the year of novitiate as full time students."

Conclusion

Novices aspiring to the priesthood, as a rule, do not follow any courses of study for credits. They take the junior seminary course before the novitiate. After profession they complete their course in philosophy, and then proceed to the study of theology. It is in communities of Brothers and Sisters that the pressure might easily be allowed to upset the well balanced program of the novitiate. This, however, was not the case a generation or two ago. Present demands of academic and technical character are mostly responsible for the pressure. No religious institute wishes to impair the proper training of its members. The wisdom of the Church, shown in her legis-

[99] *Everett Report,* p. 3.

[100] *Everett Report,* p. 3.

[101] *The Education of Sisters,* (Sheed and Ward, 1941), p. 29.

[102] *Ibid.,* p. 108.

lation, shall always be a safe guide to the total fulfillment of the ends of religious life and of the apostolate.

The combined efforts directed to a full spiritual formation and an adequate academic or technical training should go hand in hand. Women religious in America are sufficiently wise and generous to aim at the best. The writer is familiar with the magnificent spiritual training given novices in many institutes. As to the intellectual formation, the following statement tells a rather flattering story: "It is in the United States where religious women are best organized for a solid doctrinal formation." [103]

At this time when academic demands are rapidly increasing, superiors will do well to emphasize the contents of the program of the year of novitiate in its positive aspect, as stated in canon 565, § 1. It is possible that this emphasis will bring about in some institutes a corresponding de-emphasis of their academic activities during the year of novitiate. That will be a sign of spiritual health which can never impair or retard the complete formation of Sisters. The supremacy and priority of spiritual values must be retained at all cost. One of the practical ways to teach it to the young religious is to organize the program for the novices with possibly less demands of an academic nature. Let the mind of the Church abound in every religious.

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[103] *Formation Doctrinale des Religieuses,* (Paris, 1950, Les Editions du Cerf), p. 197.

Cases and Studies

MORAL CERTITUDE

In canonical circles there is no expression more commonly used than that of Moral Certitude. It is a prime requisite in so many instances both in the granting of dispensations and in the rendering of decisions in marriage trials. Are we sure that we grasp the true meaning of this expression? Unless we do, we are incapable of doing justice to the work assigned to us, and we are apt to burden ourselves and others with unnecessary hardships. We aim at a simple exposition of the nature of moral certitude in itself and in its application to marriage cases.

Truth

In our canon law work we are forever in search of truth. What is truth? It is the conformity of the mind judging about reality with reality itself. It is an adequation, a correspondence between the intellect and the object which the mind considers. When the thought of something, as it is present in the mind, is identical in all respects with that object as it really exists in nature, the mind is said to be in the possession of truth.

It is apparent that truth, then, is a mental concept, a product of the mind. But since the mind of man is not infinite, it follows that the mind cannot exhaust the knowable about any reality. It is a limited knowledge that we have of objective reality, of truth. The shadow of doubt hovers about all created truth conceived by man from the fact that the instrument he uses in its discovery is a finite, limited tool. This is not a positive discord with reality; rather, it is a negative deficiency.

When the mind grasps truth, objective reality, it renders a judgment: it affirms or it denies something regarding it. Philosophers tell us that judgment is an intellectual fractioning, or resolving, of the stream of presented reality into abstract aspects, and an interpretation or a mental representation or reconstruction of the presented reality by a series of mental comparisons of these aspects. The judgment of the mind is a relationship expressed between two thoughts, two objects, and enunciated by an affirmation or by a denial. The mind comes to this act of judgment on the basis of evi-

dence. The mind demands reasons, motives, for coming to a judgment, and these are called evidence. By evidence the mind clearly sees or apprehends adequate grounds for the relationship whereby the reality is interpreted or represented in the judgment. The mind not only sees, but is conscious that it asserts *because* the grounds are really there and they are apprehended by it. Evidence is useless as an index to truth if it appears that the determining factor between our concepts is not objective, i.e. realities outside the mind.

Does Evidence Impel Assent?

This evidence is not by itself fully cogent at any time. It is most of the time sufficient grounds for a firm, certain assent to truth, but it allows a wide scope for the exercise of prudence and caution in the intellectual processes by which truth and evidence, the steps leading to truth, are ascertained. We come to both by the processes of conceptions, generalizations, judgments, induction, deduction. We come by these to a reasoned and a reasonable certitude. Again we note, not without a purpose, the huge shadow of doubt that can be so easily cast over our product in the search for truth. In our quest we use a finite instrument, the mind; the processes of the finite mind are so open to error! Who cannot but realize that man rarely can come to sweeping affirmations or denials in any realm!

Doubt; Suspicion; Probability

When the mind has before it all the motives, the reasons *pro* and *con,* it can resolve itself into three attitudes. The mind can doubt: in this case, it refuses to give an affirmation or a denial. The mind can suspect: that is, it may be inclined to favor one side of the contradiction, but this is only a slight approval; it is not a judgment. The mind still refuses to commit itself. Thirdly, the mind can consent, assent. The mind can do so, i.e. it can choose one side of the contradictory, but with a prudent fear that the other side is true. There are serious reasons for the opposite side, but the mind in this instance is not swayed by them; in fact, it is swayed away from them whilst it is, at the same time, conscious of the weight of evidence opposed to its choice. In such a case we have a *PROBABLE* opinion. Of its essence is fear; fear that the contradictory may be true; fear which arises from the insufficiency of motives supporting the positive act of the will. The mind in a probable opinion has good, serious reasons for its affirmation or denial, and while they are

of importance, yet they are fallible, for there can exist serious reasons to the contrary. The only saving feature is that, despite the contrary reasons, the prudent man is not drawn to accept them and to consent in their direction. We cannot call this certitude. It is probability—something different from true certitude.

Real Certitude

The mind can bring itself to assent, i.e. to an affirmation or to a denial because of the evidence presented, and this *without* a prudent, founded, objective *fear* of the contradictory. It has no fear of erring. This is real certitude. When the mind gives out a judgment with no objective, prudent fear that it is in error, then the mind has certitude on the point. Absolute certitude excludes even the *possibility* of error. This can be based on the nature, the essence of things, and is called metaphysical. That every child has a mother we cannot even doubt. It is of the nature of human birth. We cannot doubt that one who feels is alive. Both these are of the essence of things. This absolute certitude may be physical, i.e. founded or based on the laws governing creation and the universe. Any problem involving the law of gravitation must be solved uniformly in the same way, since the law is of absolute application. Absolute certitude does exist; it excludes even the possibility of error in the case at hand. It is the optimum of certitude.

Moral Certitude

In judging the actions of men whereby and wherein free will comes into play, one can hardly expect to find absolute and physical certitude. There is another species, called moral certitude, which governs this category of actions. Moral certitude is based on what men ordinarily do, or would do, under the circumstances; it is the common mode of acting to which men are inclined by nature, and which *de facto* men ordinarily follow, although physically they are not constrained to do this. Prudent men are assured by this species of certitude of the truth for any case under consideration which deals with the actions of men. They know that this species of certitude is based on the constancy of laws and usages which govern human activity.

Moral Certitude vs. Probability

The difference between this moral certitude and a simple probability is easily ascertainable. Moral certitude admits of *NO pru-*

dent, founded objective doubt; it does admit of the *possibility* for the contradictory to be true. The possibility must be admitted, because we deal with the free will of men in such actions under judgment; and actually men could choose *NOT* to follow the ordinary average norm in their mode of conduct, and therefore there is a possibility for the contradictory to be true; but in most cases this will not come about; there will be no serious reason why this possibility should be held as verified in the case under consideration. On the other hand, the essence of *probability* is a well-founded fear that the contradictory is true; there are serious reasons for the contradictory to be true. In moral certitude there is no prudent, founded fear that the contradictory is true.

In reading textbooks, and especially in the domain of Law and Moral Theology, we must be on our guard against misinterpretation of moral certitude and probability. Sometimes authors speak of moral certitude as a *summa probabilitas.* This is wrong. Probability and moral certitude are not of the same species. One never comes to moral certitude by the additions of probabilities; one does not and could not. Again, some call into doubt the real nature of certitude in moral certainty. Certitude in its essence excludes all prudent fear of erring. Moral certitude does exactly that; and therefore it can and should be classed as real certitude. One may question the '*firmitas*' of moral certitude. It has not the same degree as metaphysical or physical certitude, 'tis true; the '*firmitas*' depends on the reasons, for the motives behind the assent and the conclusions drawn therefrom will be as firm as their basis. But the *firmitas* is not of the essence of certitude; it is the exclusion of all prudent fear that makes certitude; it is the presence of such a fear that makes only probability.

Moral Certitude: A Necessity!

The role assigned to moral certitude in the determining of decisions in matters in which human nature plays such an important part cannot be over-rated. If we go back to the first pages of this article and consider the finite instrument with which we seek truth; when we stop and reflect on the wide scope of error possible in the five or six steps to truth in man's search thereof; and, lastly, when we ponder on the freedom of the human will in the shaping of human events, we can be thankful that moral certitude is a norm of determining truth in every-day practical life. How little would we

judge in a human way if metaphysical or physical absolute certitude were demanded of us? Aristotle reached the same conclusion when he told us that in human actions and doings one could not attain to that certitude which would exclude all solicitude. And St. Thomas insisted that in human judgments a '*probabilis certitudo*,' i.e. what happens in most cases, must be held sufficient, for otherwise we would have to suspend judgments in most cases, and this indeed would be absurd. (2-2, q. 47, a. 9 ad 2). Since we cannot obtain absolute certitude which excludes even the possibility of error in judging human actions, philosophy and law give us another certitude, a real certitude, namely moral certitude, which may not be as firmly enrooted as metaphysical or physical, but nevertheless suffices to permit us to reach a judgment that is free of all founded fear of error. The greatest philosophers have held that this is, of necessity, sufficient for decisions involving human actions for otherwise man could not judge most of the time, and man would have to suspend his decisions in his practical every-day life. St. Thomas held that this would be absurd.

The Mind Makes Moral Certitude

It is of importance to note, in closing, the rôle that the mind plays in the forming of moral certitude. It is, essentially, like all certitude, reflexive in its formation. It is a product of interaction on the part of the mind and the will. Moral certitude will not exist until the mind is satisfied with the motives adduced and in its reflection finds in them the only possible, reasonable solution in the case; moreover, the mind will come to the conclusion that such certitude in this case, given all the circumstances, is sufficient as a sure norm of action. A conviction must arise in the individual; he must decide for himself; his mind must be so quieted that he can, without fear, conclude that he has truth.

In Marriage Cases

Our present Holy Father gave two important messages on the subject of moral certitude. The one more relevant to our subject was given on October 2, 1942, to the judges of the Rota; a year previous, the subject was moral certitude in general. The Pope subscribes to the traditionally received definition of moral certitude: it is based on the constancy of laws and usages which govern human activity so that, whilst the contradictory is possible, it does not

come about because of its opposition and incongruity with reasonable human nature and its tendencies. However, the Supreme Pontiff adds something new to the concept of moral certitude when he insinuates that in our domain the definition should be '*modus iudicandi et loquendi quem homines sani iudicii in actione et in vita servant.*' Moral certitude is that security in mind which men of sound judgment exact when they act or judge actions in every-day life.

Which is Required?

The Pope recognizes that there is such a thing as absolute certitude, which excludes every possible doubt concerning the event at hand and its true notion; there is an intrinsic impossibility that the contrary be true. This is certitude in the highest degree. It *is not required* for the settling of marriage cases.

Probability

On the other extreme, the Pontiff remarks there is a '*firma probabilitas.*' This is not certitude, since it does *not exclude* all prudent fear of erring. Moreover, this *firma probabilitas* is *not sufficient* for rendering decisions in marriage cases. Whenever there is a well-founded motive or evidence indicating that the contradictory may be true, then the judge must not act on that opinion. It is, in such instances, that the presumptions and the favors of the law come into play and determine the judge to choose for the validity of the act most of the time and permit the juridical status of the act to remain untouched. The Pontiff remarks that it is only in these cases that the judge should take refuge in the presumptions of law, and then very conscientiously.

Moral Certitude

In between the two, namely, in between absolute certitude and solid probability stands moral certitude excluding every prudent, well-founded doubt. The difference with absolute certitude and with solid probability on the part of moral certitude needs no explanation if we but ponder the above stated definitions. The Holy Father tells us that moral certitude alone is required and suffices for rendering decisions in marriage cases. Even though absolute certitude could be obtained in a particular case, it would not be necessary for the judge to seek it once he had obtained moral certitude on the case in question. To exact absolute certitude, i.e. the exclu-

sion of all possible error or fear of error, would be morally wrong for the judge; it would be just as wrong for the judge to exact only a solid probability. The judge must, in his own mind, come to a decision on the basis of what an average person, under the circumstances, would have most likely done. He must come to a decision on the basis of what a man of sound judgment would conclude if faced with the circumstances of the case, were he acquainted with the ways of acting and of speaking on the part of average individuals.

Certitude: Effect of Totality

The Pope remarks that sometimes moral certitude cannot be formed from the evidence if proofs are taken singly. But once they are united and considered as a unit and the mind reasons on all proofs together, moral certitude may result and leave no reasonable doubt in a man of sound judgment. Each proof in itself may be recognized as insufficient by the judge, and yet he may attach them all to a common base from which will spring the complete picture of objective reality. Such a procedure is just and reasonable, says the Pope, since it is founded on the principle of 'sufficient reason,' namely, that which really exists must have a cause, a reason for its very existence. This is a universal principle of absolute security.

The Objectivity of Moral Certitude

Unless the moral certitude of the judge is founded on objective motives it is useless. Subjective feelings, emotions, sentiments play no part in its formation. Motives must convince the judge that the contrary to his judgment is not solidly probable. He will come to this objectivity by a scrupulous application of the processual law in the building up of the case. Such canons as indicate the competency, number, etc. of the personnel assigned to the case, or determine the nature and number of the proofs, or require corroboratory evidence, etc., the judge must be assured have been followed in the procedure. There are numerous prescriptions of processual law which must be strictly adhered to if the objectivity of the evidence is to be properly guaranteed. One could indeed follow procedural law so closely as to cause to spring up a juridic formalism as a means, not an end in itself. It could thus be a means to the discovery of the truth, not an obstacle to it.

Juridic Formalism

This danger of formalism is not overlooked by the Roman Pontiff. He dissuades its use by calling attention to the generous provisions of Canon Law which grant the greatest of liberty to the judge for a personal appreciation and appraisal of the evidence. The judge has not the right to a free interpretation; but, guided by the norms of processual law, he must form the sentence in the case on his own knowledge and on the dictates of his conscience, and must decide for himself if the proofs are sufficient or not. It is not possible in our law that a judge be convinced in his conscience of one decision, and then find himself tied to the contrary by the norms of law. The Pope declares that in this eventuality the judge has misinterpreted the law against the will of the legislator, or has not properly evaluated the evidence.

Moral Certitude and Human, Fallible Witnesses

In marriage cases our moral certitude will come from witnesses, and from documents. Can we trust them? Can we rely on their veracity? A document can be verified as to its authenticity, etc. What about human beings? It has always been conceded that if men give a recital of facts, and not an interpretation of facts, we can rely on them. If witnesses testify as to what they have seen, heard (NOT what they surmise, opine), and if they are cumulative, i.e. they testify, many of them, in exactly the same way on the same point, and if the witnesses come from different places and testify at different times and are of different personality, character, states in life, etc.—their testimony would be sufficiently strong to become morally infallible. Their credibility could be confirmed by sound judgment.

One Witness

An interesting point arises concerning the requisite of two witnesses as a norm of moral certitude. What if there be only ONE available witness for the formation of such certitude? Philosophers have always maintained that one witness would be acceptable as the source of truth if he was meticulously truthful, and if one could not conceive that he spoke falsely; and, especially, if in the case it would be contrary to his interest to do so.

In a Rotal decision of November 7, 1951, *coram Mattioli* (cf. *Monitor Ecclesiasticus*, 1953, p. 64) it was held that in marriage cases based on an internal act such as fear, etc., known only to the one responsible for the act, it is useless to raise the question of numerous witnesses. The Rota noted that canons 1791 and 1869, § 3, do counsel many witnesses, two at least—but this is not an absolute norm that precludes exceptions. It held that the lower court was wrong in refusing an affirmative decision for invalidity because of the lack of two witnesses, as if there were no other way of bolstering the testimony of ONE witness in order to come to moral certitude. It insists that '*in causis spiritualibus*' the testimony of one witness might well be sufficient if it were strengthened cumulatively by facts related by the party or parties to the case, by the testimony of others, who *in tempore non suspecto* had heard concordant testimony in the case, by circumstances and other bits of evidence. If all these facts would be beyond doubt, they, with the testimony of one witness who is above reproach and enjoys the highest of recommendations, would be sufficient for the forming of moral certitude in the mind of the judge (Cf. "Evaluation of Evidence in Matrimonial Cases," by Rev. J. S. Quinn, in *The Jurist*, XVI [1956], 403-416).

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PROBLEMS OF MORAL PERSONALITY IN A RELIGIOUS PARISH *

Any study of canonical literature reveals the existence of a number of problems connected with religious parishes and a considerable divergence of opinion amongst canonists on the solution of these problems. A good many difficulties arise about the administration of property in the religious parish, and any solution of these difficulties must ultimately be sought in determining the precise nature and effects of incorporation on the various moral persons involved in the concept of the parish.

This paper is an attempt to outline the state of canonical opinion on this matter, and very tentatively to suggest the principles governing the question and their practical consequences. It is rather a complicated question and I must apologise in advance for the many things which must be left unsaid in a short paper of this nature.

In the first place it must be made clear that this paper deals only with the religious parish in the real sense, i.e. with the parish which has been united or incorporated "*pleno iure*" with a religious moral person (religious house, province, Order or Congregation), so that, in the words of canon 1425, § 2, "*paroecia fit religiosa*". There is another form of union, "*quoad temporalia tantum*", which is hardly of practical importance in our own country at least and which we can safely ignore. More frequently perhaps a parish is simply *entrusted* to religious without any change in the nature of the parish. While such a situation may have its own problems, there is no reason to worry about the fate of the parochial moral persons in such cases and, consequently, the matter is outside the scope of this paper.

So we confine ourselves to the religious parish in the real sense. It may be as well to refer immediately to the recent practice of the Sacred Congregation of the Council which commits a parish to religious "*ad nutum S. Sedis*" without the use of the time-honoured formula "*pleno iure*". In my view this is not, as has been suggested, a *forma media* between the union "*pleno iure*" and the mere commission or entrusting of the parish to religious, but does indicate simply the traditional form of the "*pleno iure*" union. This phrase "*ad nutum S. Sedis*", simply makes explicit what is implicit in the "*pleno iure*" union, namely that once the incorporation is effected

* This paper was read at the Meeting of the Canon Law Society held in London, June 11-12, 1957.

it can only be destroyed by the intervention of the Holy See. On the one hand, the local Ordinary is reminded that, having granted the permission for the parish to be committed to the religious, he has no power to withdraw the parish from the religious, on the other hand, the religious are reminded that, while their tenure of the parish is by no means precarious, it may still be terminated by the Holy See where the good of souls demands it. But the clause "*ad nutum S. Sedis*" does not affect or limit the perpetuity inherent in the notion of the "*pleno iure*" union.[1]

The Parochial Moral Persons

Now to come to the problem itself, and we must first of all determine the number of moral persons involved in the parish. Normally there seem to be at least three such persons. The first and obvious one is the *parochial benefice* with its sacred office and the "*ius percipiendi reditus*" in accordance with the definition of canon 1409. Secondly, there is the *ecclesia paroecialis.* Normally a church has moral personality "*ex ipso iuris praescripto*" (cf. canon 99 and particularly canon 1495, § 2). We say *normally,* since, as Delgado[2] and Muller[3] point out, there may be cases in which the church is merely part of another moral person, as is the case of a religious church in the full sense, which constitutes one moral whole with the

[1] Cf. Goyeneche, *Quaestiones Canonicae de Iure Religiosorum,* II, pp. 381-382:—"Fatendum est definitionem desiderari authenticam huius novae formulae unionis paroeciarum domibus religiosis iam abhinc nonnullos annos a S.C. Concilii adhibitae . . . Nova ergo formula quid medium videretur inter unionem ad temporalia tantum et pleno iure." The same writer, in another reply (ib. 380-381) seems to recognise that the phrase does not create a new form of union, and quotes with approval an article in *Il Monitore Ecclesiastico,* 1947, p. 225, signed simply with the letter "R", but apparently by an official of the Congregation of the Council, which asserts the view stated in this paper in the following words:—"La clausola 'ad nutum S. Sedis' che la S.C.C. usa inserire nel rescritto di concessione dell'unione pleno iure, non distrugge la perpetuità dell'unione pleno iure come la canonica remotio del parocco inamovibile non distrugge la caratteristica dell'inamovibilità del parocco secolare. Tale clausola vuol soltanto significare che non compete all'Ordinario diocesano, ma solo alla S. Sede, di dividere due enti che Essa aveva prima uniti."

[2] C. Delgado, *De Relationibus inter Parochum Religiosum et eius Superiores Regulares,* Rome 1940, p. 87.

[3] F. I. Muller, OFM. *De Paroecia Domui Religiosae Commissa.* Washington, 1956, pp. 9-10. This thesis has been used extensively in writing this paper and is an admirable treatment of the whole question.

religious house. This exception naturally is of importance in many religious parishes.

There is a considerable amount of discussion as to whether the church fabric is also a moral person "*ex ipso iuris praescripto*". The question does not seem to be very important and probably the best solution is that advanced by Muller,[4] namely that the church fabric is not necessarily a moral person distinct from the church, though it may be erected as such by the competent ecclesiastical authority. Whatever view is adopted on the point it makes little difference to the special problem we are considering.

Finally, there seems to be no doubt that the *parish as such* is also a moral person. While the Code does not state explicitly that the parish is a moral person, this fact is undoubtedly implied in a whole series of canons—cf. c. 1208, § 1, and cann. 1356, 533, 1181, 470, § 4 etc. How the parish as a moral person is to be defined is another question. Delgado says: "*hoc institutum quod vocatur paroecia quae pluribus elementis constat et quae consideratur ut centrum vel potius institutum curae animarum destinatum.*" [5] Another author says that the term parish, as used by the Code, implies a parochial organisation or juridical institution, established in accordance with the law in a determinate territory, with its church, people and pastor.[6] Or again it might be called "*persona moralis ecclesiastica constans massa bonorum inservientium in bonum et commodum paroecianorum.*" [7] But whatever the definition, we can, I think, agree with one writer who says: "*Personae moralis rationem, eamque ex ipso iuris praescripto, inesse paroeciae, nemo est iurista qui neget, id enim aperte satis est ex littera Codicis constat.*" [8]

The Effect of Pleno Iure *Union on these moral persons*

We admit then the existence of at least three moral persons within the general notion of the parish, and we now have to decide what is the effect of incorporation or union with a religious moral person on these three persons. Or, to put the question in another way, what is the precise effect of the words of canon 1425, § 2, "*paroecia fit re-*

[4] *Op. cit.*, p. 13.

[5] Delgado, *op. cit.* p. 106.

[6] G. Stocchiero, *Il Beneficio Ecclesiastico 'Sede Plena'*, Vicenza 1942, p. 357.

[7] Anon. "De administratione bonorum in paroeciis religiosis," in *Acta Ordinis Fratrum Minorum*, LVII (1938), p. 187.

[8] P. Bernier, *De Patrimonio Paroeciali*, Quebec 1938, p. 58.

ligiosa". In what way and to what extent does the parish become *religious?*

Now there is one interpretation of c. 1425 which implies a complete change in the traditional concept of the union *"pleno iure"* and which as far as one can judge, leaves very little difference indeed between the religious parish in the real sense and the parish merely entrusted to religious. This opinion is explained by Fr. Bondini in an article in *Il Monitore Ecclesiastico* of 1926[9] and is supported by a minority of authors. It is based upon the words of canon 1425, § 1, where dealing with the union *"ad temporalia tantum"*, the legislator says that in virtue of this union the religious house *"particeps fit solummodo fructuum paroeciae."* This condition is to be applied to *"pleno iure"* union also. Consequently there is a complete distinction of the moral persons involved in the religious parish. The moral persons involved in the parish continue to exist as true juridical entities and in no sense do the church, the endowment, and the various properties of the parish become subject to the religious moral person. In a sense, I suppose, this view considers the union as *aeque principalis,* in which the moral persons remain quite distinct, neither being subjected to the other.

The objections to this view are, first of all, that it introduces a change in the law for which there is very little evidence and *omnis correctio in iure odiosa est.* Undoubtedly the old law considered the *"pleno iure"* union as involving a transfer of ownership so that the religious house becomes the only subject of ownership as far as the goods of the incorporated parish are concerned.[10] Secondly, as has been said, this view of the union leaves very little difference between the religious parish in the real sense and the parish entrusted to religious. In fact as Fr. Dailey observes, the religious are really in a better position in the latter case, since the religious *parochus* is presumably the holder of the parochial benefice.

Consequently the common doctrine even after the Code considers that the law is substantially the same, namely, the temporal goods of the united parish are possessed by the religious and they become *bona religiosa* in some sense. *"Cum paroecia pleno iure domui religiosae unita sit, beneficium paroeciale transfertur in dominium domus religiosae et ideo domus religiosa est subjectum non solum officii paroecialis, sed et iuris percipiendi reditus, fructus, etc: in-*

[9] A. Bondini, "Circa il rendiconto di Parrocco Religioso al Vescovo," in *Il Monitore Ecclesiastico,* 1926, pp. 335-347.

[10] Cf. Muller, *op. cit.* for the traditional concept and historical development of the *"pleno iure"* union, pp. 48-49.

super, dos beneficii venit in proprietatem et dominium domus religiosae." [11]

Accepting then that there is a real union of the moral persons in such a way that there is this change in *dominium* of the parish property, the two questions which remain to be settled are: which particular moral person or persons which we have distinguished in the parish (benefice, church, parish as such) is actually the subject of the union with the religious house? Is it simply one or other of them, or is it all? Secondly, does this union have the effect of destroying the independent moral personality of the parochial moral persons. It is on these points that one finds the greatest difference of opinion.

In regard to the first question, there are some writers, notably Fr. Dailey, S.J., who consider that the object of incorporation is the parochial benefice, the parochial church fabric, which is the *sedes iuridica* of the parish (i.e. in those cases in which the church was not, previous to the union, already the property of the religious community), and also the parish itself, if one holds that the parish is a moral person.[12] The argument is based upon the force of the words of canon 1425, § 2: "*paroecia fit religiosa*". The word "*fit*" indicates a complete change in the status and nature of the parish. "It becomes *religiosa* i.e. pertaining to a religion and of a religious character. The parish becomes something pertaining to a religious house, a part, a member of the same . . ." [13] The parochial office is now a religious office, and the church a religious church. Since it has a religious character, the parish takes on the nature and privileges of a religious institution. The religious house enjoys the right of exercising parochial functions and the possession of parochial goods. But it has these goods with the obligation of using them for the purpose for which they were given. By the fact of union with the religious house, parochial goods do not lose their primary destination, although they do change their nature and proprietor.

A perhaps more congenial view considers the real object of the union is simply the parochial benefice. Against Fr. Dailey's opinion it can be pointed out with Fr. Muller, that the parish itself can scarcely be the object of the union. Surely one cannot maintain that the actual parish has so changed its status that ". . . it takes on

[11] Muller, *op. cit.*, p. 50.

[12] R. H. Dailey, S.J., *The Primary Effects of the Union Pleno Iure of Parishes with Religious Communities*, Rome, 1951, p. 57.

[13] Dailey, *op. cit.* p. 57.

the nature and privileges of a religious institution . . ." Would it acquire exemption if the religious in question are exempt? Rather, the parish as such retains its former status, as a unit of the diocesan organization—*paroecia qua talis remanet iuris dioecesani* and remains subject to the local Ordinary. Again, as far as the church is concerned, it can have a completely independent administration from that of the parish. It can belong to the bishop or the diocese or to some other moral person, e.g. to the religious community itself, in which latter case, it forms one more whole with the religious house. So, having excluded the parish and the church, all that is left for union is the parochial benefice. It is this moral person which is united with the religious house, and the union involves two things; it is a union *quoad spiritualia* and *quoad temporalia*. From the point of view of the spiritual office, the religious community becomes the habitual parish priest (canon 451, § 1) and, consequently, the parish never becomes vacant in the technical sense. It is now a religious benefice and, in accordance with canon 1442, the *vicarius actualis* must be a religious. Notice, then, that there is a certain stability in the title holder of the parochial benefice in the religious parish which cannot, in the nature of things, be verified in any secular parish. This suggests that there can be a different mode of holding the *bona beneficialia* in the religious parish from that prevailing in the secular parish. Hence *quoad temporalia,* the effect of the union is the transfer of the *bona beneficialia* to the religious house as the real subject of ownership. It is a union of benefices and is dealt with in the Code under this heading.

Therefore we can exclude from the union both the parish as such, which remains a distinct moral person, with its own property administered quite distinctly from that of the religious house, and the church which will remain a distinct moral person if the religious parish has been erected in a secular church.

Now the question remains to be answered whether the parochial moral person (or persons, if one accepts Fr. Dailey's view) are suppressed or continue in a subordinate existence. Dailey, along with others, including Wernz-Vidal, would hold that there is no longer any necessity for more than one moral person to exist in the parish. We are dealing with non-collegiate moral persons, obviously, and such persons exist as subjects of rights and duties to ensure the use of the *massa bonorum* for its proper purpose under the guidance of suitable administrators. But having transferred that complexus of rights and duties to another moral person, and having ensured by

adequate provisions of law, that the successive administrators of the second moral person will fulfil the duties and maintain the rights of the first person, is there any longer any reason for a continued existence of the original non-collegiate moral person or persons? In the case of the religious parish the rights and duties of the parochial office-benefice are transferred to the religious community; it receives too the parochial goods so that it may administer them in accordance with their original purpose, so there is no longer any necessity for these other moral persons to continue in existence. "The purpose of the parochial patrimony is perpetually guaranteed. The care of souls is perpetually assured. Therefore I cannot understand why one should say that the parochial benefice remains a moral person distinct from the religious house . . ."[14] The union "*pleno iure*" is therefore extinctive, all the rights and duties of one moral person being transferred to another.

Against this is the view more commonly advanced, I think, and illustrated by Delgado and Muller, that the union is rather *minus principalis*, so that the distinction between the two moral persons is preserved, but the religious house becomes the principal or superior element in the union, the other (the parochial benefice) becomes the accessory or subordinate element in the union. Since the parochial benefice continues to exist as a separate moral person though subordinate, Muller[15] suggests that the immediate subject of the ownership remains the benefice itself in accordance with canon 1410: "*. . . bona quorum proprietas est penes ipsum ens iuridicum*". But in virtue of the "*pleno iure*" union the *pars temporalis beneficii*, or the *bona beneficialia* are transferred to the religious house, in the sense that there is no one *subject of ownership* of the goods, though the *bona beneficialia* are not the only object of ownership of the religious house. In other words, this does not mean that the goods may be confused with those of the religious house to constitute one object of ownership with a common administration. The beneficial goods can and should easily retain their own administration distinct from the rest of the *bona religiosa*. They cannot be used and dispersed as the religious house wishes, but they must be administered and used in accordance with the terms of the law. If the religious relinquish or forfeit the parish, these beneficial goods must be restored in entirety to the local Ordinary or the Holy See. Delgado[16]

[14] Dailey, p. 62.

[15] Muller, *op. cit.* pp. 56-57.

[16] Delgado, p. 105.

on the one hand and Dailey [17] imply that these *bona beneficialia* do constitute one *massa bonorum* with the *bona religiosa* of which they now form a part. It seems a purely practical matter as to whether they are administered separately from those of the religious house itself.

So I am inclined to follow the view that the union affects the parochial benefice alone and that even here the moral personality of the parochial benefice remains, even though in a subordinate capacity to that of the religious house.

A Note on the Administration of Parochial Property in the Religious Parish

Having stated the principles one should, naturally, demonstrate their practical application in the administration of the religious parish. This is not quite so easy and would take quite a long time. However I mention a few points on this matter for your consideration and discussion.

As far as the *bona beneficialia* are concerned, there is little that needs to be said, especially as far as the situation in our own country is concerned. They belong, in the sense explained, to the religious community, *accrescunt bonis religiosorum,* and are to be administered by the administrator of the property of the religious.

The *bona ecclesiae* are, in the words of canon 630, § 4, those which are destined "*pro ecclesia paroeciali aedificanda, conservanda, instauranda, exornanda*", and also whatever is given for the purposes of divine worship in the church together with the movables and immovables which pertain to the sacred building as such.[18] Now where the church is unquestionably a religious church, in the sense that it is in the ownership of the religious, the ownership and administration of these goods pertain exclusively to the religious Superior (canon 630, § 4). On the other hand, where the church is unquestionably a secular church, then the administration of such goods is a matter for the local Ordinary, though normally he will leave the administration presumably to the parochial vicar.

What about the case in which the church already existed as a parish church and is handed over to the use of the religious, without any change in ownership, when the parish is united with the religious house? Is this church "*communitatis religiosae*" in the sense of canon 630, § 4? It seems as though it is, since canon 630

[17] Dailey, p. 22.

[18] Cf. *Acta Ordinis Minorum,* LVII (1938), pp. 187 ss.

does not mention the question of ownership, nor does canon 609, § 1, which speaks simply of a church "*apud quam residet communitas religiosa*", and further, in referring back to canon 415, canon 609 says that in such cases, the care of the church and the administration of its goods will pertain to the moral person. Therefore, if such a church is committed to the use of religious, *modo non precario*—with a certain measure of permanence—it is a religious church in the sense of canon 630, § 4 and the administration of its property pertains to the religious Superior.

Therefore, whatever is given or obtained specifically for the benefit of the church, will in such cases, come under the exclusive administration of the religious Superior. At the same time, since this church serves the needs of the parish, in equity, the parochial funds should contribute, in an agreed measure, to the upkeep of the religious church.

Finally, the *bona paroeciae*. In general, whatever is given or acquired "*intuitu paroeciae*", for the parish or generally for the benefit of the parish as such. These include apparently collections taken on the occasion of parochial or quasi-parochial functions and offerings given for parochial purposes. The administration of the parochial property in the religious parish pertains to the parochial vicar under the vigilance and inspection of his Superiors. But he is independent in his actual use and expenditure of strictly parochial funds of his Superiors and obliged to render his account to the local Ordinary and seek his permission for investments, etc. etc.

We must, of course, exclude from the parochial funds certain offerings etc. given to the religious community as such, and which pertain to the exclusive administration of the religious. These *bona communitatis religiosae* include naturally the revenue of the *bona beneficialia*, Mass stipends, the stipends due in particular legislation to the parochial vicar and his assistants and his domestic staff, offerings given expressly for the purposes of the religion, education of its members, foreign missions etc. and any offerings given as personal gifts to the parish priest or his assistants, and stole fees unless particular legislation makes any provision in this matter. Again, in the religious church, any collections taken at functions which are strictly non-parochial and purely those pertaining to the religious community, belong to the religious and not to the parish.[19]

[19] Muller, *op. cit.* p. 67-68.

This I fear, is a somewhat inadequate statement of the position, but I hope it is a sufficient outline of the situation to provide a basis for a discussion of the problem of administration in a religious parish.

APPENDIX

The following document has been communicated by the courtesy of one of the members:—

Sacra Congregatio de Religiosis
Prot. Num. 1118/46

NOMEN DIOECESIS X

(Omissis)

Ad mentem. Mens est placere de concordia. In concordia autem:—

1) Servari quoad substantiam debet canon 630, § 4 ideoque cum agatur de ecclesiis regularium Ordinis propriis, administratio eleemosynarum, quae a fidelibus Fabricae ecclesiae directe et in hunc finem expresse offeruntur, atque illarum quae non a functionibus paroecialibus (cf. infra n. 2) sed ab illis e contra functionibus proveniunt quae Ordinis seu Communitatis religiosae peculiares propriaeque sunt, Superioribus religiosis reservari debent.

2) Quoad alias omnes oblationes et eleemosynas sive pro paroecia seu intuitu paroeciae offeruntur (can. 533, § 1, 4°; 535, § 3, 2°) sive ex functionibus proveniant quae paroeciales stricto sensu dici debent (can. 462), sive ex eis etiam quae, etsi non sint stricte paroeciales, tamen in paroeciis cultui paroeciali ex legitimo iure particulari receptisque consuetudinibus accensentur, ita ut in omnibus paroeciis communiter celebrari soleant, fiat massa communis cuius administratio a vicario paroeciali sub vigilantia et inspectione ac directione Ordinarii loci ad normam iuris gerenda est.

3) Ex communi praedicta massa (n. 2) iuxta consuetudinem regionis et dioecesis stipendia et distributiones fieri ac definiri debent quae Vicario Actuali (can. 471, § 1), Vicariis cooperatoribus, Administris cultus danda sunt, pariterque contributiones quas paroeciae pro expensis generalibus Ecclesiae et pro necessitatibus Fabricae praestari debent.

URBAN JUDGE, OFM

ADDICTISSIMUS: HOW TO CLOSE A LATIN LETTER

Since most of the Roman Congregations do not at present welcome communications in English, priests in Chancery Offices are frequently confronted with the task of writing Latin letters. Having completed the factual narration with more or less ease, they are faced with the problem of bringing the letter to an urbane and graceful close, ready for the Ordinary's signature. They try the files and find a letter from the Cardinal Prefect of one of the Congregations, but the question then arises as to whether a Bishop should use the same conclusion in addressing the Cardinal.

The present article, or *florilegium* of complimentary conclusions, is an attempt to assist such harassed letter writers and to supply Chancellors and Secretaries with a bit of variety to end their Latin letters. A perusal of samples of epistles from Rome over a seventy year period shows a great variety of taste in the officials of the Curia. Some Cardinals, like Merry del Val and Gotti, tried to be original by turning their phrases a bit differently in each letter. Others were satisfied with a stereotyped conclusion to all letters.

Earlier specimens all use "*Amplitudini Tuae*" to Bishops and Archbishops, often abbreviated A. T. This form is practically extinct—only one use of it being found in recent years—giving way to "*Excellentiae Tuae Reverendissimae.*" On the other hand, hardly a letter in the whole period studied fails to use "*Addictissimus*". The initial "A" may be capitalized or not; the construction may force it into the objective case; but it is always there — between equals, or from an inferior to a superior, or vice versa. They are all "most addicted".

The conclusions given here are all taken from letters, either personal or circular, from the officials of the various Roman dicasteries. Identification is not made because it seems pointless.

Since the vast majority of letters to Rome are addressed to the Cardinals, particular attention is given to final greetings suitable for an inferior to a superior. However, humility seems to be a particular virtue of the Cardinals of the Curia, so that most of their closing formulas would be entirely fitting for lesser ecclesiastical dignitaries to employ in writing to their superiors.

In citing forms, the word "*Eminentia*" is used for Cardinals in all cases; in letter to a Bishop or Archbishop "*Excellentia*" should be substituted; to one under episcopal dignity "*Reverentia*", and the adjectival form "*Reverendissima*" should be omitted. It is to be noted that the second person singular, rather than the plural, is used almost universally in reference to the addressee, and the first person singular rather than plural for the writer. Abbreviations are a matter of taste and are retained in the forms where they were originally used.

Some readers may wonder why no formula is given for concluding letters or petitions to the Holy Father. These, however, all conclude with the immemorial and fixed but abbreviated formula: "Et Deus, etc." which stands for "Et Deus te diu sospitem servet."

Forms of conclusions in current usage are:

Eo quo par est obsequio Eminentiam Tuam R.mam prosequitur seque profitetur,

addictissimum,

* * * *

Omni quo par est obsequio Eminentiam Tuam Reverendissimam prosequor meque profiteor,

addictissimum,

* * * *

Interim omni quo par est obsequio me profiteor

Eminentiae Tuae Rev.mae

uti fratrem,

The "*uti fratrem*" will of course be employed only among equals or by a superior to an inferior; "*addictissimum*" could be substituted.

* * * *

Haec dum Tecum communico, impensos meae aestimationis sensus Tibi obtestor permanens,

Eminentiae Tuae Rev.mae

addictissimus,

* * * *

Impensam meam observantiam Tibi obtestor permanens,

Eminentiae Tuae Rev.mae

Addictissimus,

* * * *

Interea sensus summae venerationis Tibi libentissime in Domino obtestamur,

Eminentiae Tuae Reverendissimae
in Ch. I. addictissimus,

* * * *

Qua par est reverentia, laetam nanciscor occasionem ut plurimam Tibi salutem dicam.

(etc., *ut supra*)

* * * *

Felicissima nunc Tibi optantes a Deo obsequentisque nostri animi sensus corde profitentes, plurimam salutem dicimus.

Eminentiae Tuae Ill.mae
addictissimus in Ch. J.

* * * *

Interea omni, qua par est, observantia et obsequii mei sensus profiteor et salutem plurimam in Domino Tibi dico

Eminentiae Tuae Reverendissimae
addictissimus in Ch. I.

* * * *

Cuncta fausta a Domino adprecor et Eminentiae Tuae Reverendissimae permaneo,

addictissimus servus,

* * * *

Henceforth, the concluding "*addictissimus*" and "*Eminentiae*, etc.," will be omitted as enough examples have been given. Occasionally, it should be noted, the text calls for the objective case, "*addictissimum*". A few more of the texts that precede the final signature are given below, especially from the older sources.

* * * *

Interim Deum precor ut Te diu sospitem incolumemque servet.

* * * *

Iucundum interea accidit mihi hac occasione uti ut meum studium confirmem, quo sum,

* * * *

Interim, accipe sinceros obsequii sensus cum quibus maneo,

* * * *

Opportunam nactus occasionem sensus existimationis meae erga Te maximae profiteor meque confirmo.

* * * *

Interim Deum precor ut te diu sospitem servet.

* * * *

Interim vero Deum precor ut Eminentiam Tuam diutissime sospitem incolumemque servet.

* * * *

Quae quidem libentissime tibi scribens, peculiaris observantiae meae sensus tibi profiteor ac felicissima quae a Domino precor.

* * * *

Studiosissimi obsequii mei sensus Em.tiae Tuae declarandi occasionem libenter arripio, dum me profiteor eiusdem,

* * * *

Fausta cuncta Tibi a Domino, Supremo bonorum omnium Largitore, enixe adprecor.

* * * *

Sensus meae in Te existimationis maximae confirmo, quibus sum et permanere gaudeo.

* * * *

All of which good wishes are yours, dear reader, if you have persevered so far. *Addictissimus.*

THOMAS J. FEENEY

DAVENPORT, IOWA

Decrees and Decisions

CANONICAL

CATHOLIC UNIVERSITY OF TOKIO

By a decree of Nov. 4, 1956, the Sacred Congregation of Seminaries and Universities established a Faculty of Sacred Theology in the Catholic University of Tokio, called *Sophia,* and granted authority to confer academic degrees to the said Faculty.

* * * * *

EDICTAL CITATION

The Sacred Roman Rota, on Mar. 15, 1957, cited by edict, Mrs. Luciana Baratelli, respondent in the case *Mannozzi-Baratelli,* which began in Rome.

* * * * *

CIVIL

MANDAMUS

The United States Supreme Court has had occasion to rule on the power, under Rule 53(b) of the Federal Rules of Civil Procedure, of a court of appeals to issue writs of mandamus to compel a district judge to vacate orders referring an antitrust case to a master (*auditor,* in Canon Law). Two extremely complex antitrust actions were instituted in the District Court in 1950. In 1955, after tangled hearings on preliminary pleas, motions, amended complaints and dismissals, the cases were set for hearing. Plaintiffs estimated the trial would take six weeks. The judge stated that he did not know when he could try the case "if it is going to take this long." He, therefore, asked the parties to agree to have the case heard by a master. When they ignored his request the judge entered orders of referral on his own motion. Thereupon the parties went to the Court of Appeals which issued writs of mandamus ordering the judge to vacate the referral orders. The U. S. Supreme Court af-

firmed issuance of the writs. To the contention of the district judge that his action could be reviewed by the Court of Appeals only on appeal and not by way of mandamus the Supreme Court replied that the Court of Appeals could at some stage of the antitrust proceedings entertain an appeal and, therefore, " it has power in proper circumstances as here to issue writs of mandamus reaching them." The Court went on to say that it did not mean that the conclusion reached on the facts in this particular case was intended or could be used to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders, but it found that the Court of Appeals was justified in issuing the writs under the circumstances, for the district judge was intimately familiar with the cases and had long experience in the antitrust field. Hence, he could dispose of the litigation with greater dispatch and less effort than anyone else. The Court also stressed the fact that references to a master are exceptional, and, in spite of the heavily crowded dockets in many district courts, congestion alone is not such an exceptional circumstance as to warrant a reference to a master.

The dissenting judges took the position that the real issue in the case was whether review by the Court of Appeals should await final decision by the district court or whether the orders were reviewable before that time by mandamus. They held that the issuance of the mandamus writs in this case was a violation of the expressed congressional policy against piecemeal appeals.

* * * * *

OBSCENITY

The United States Supreme Court has reversed a conviction under a Michigan statute, which was obtained after appellant had sold to a police officer " a book containing obscene, immoral, lewd, lascivious language, or descriptions, tending to the corruption of the morals of youth." The Supreme Court took the position that the statute was not reasonably restrictetd to safeguarding children from obscene literature, the evil with which it purported to deal. " The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." The Court also noted that there was another statute on the books in Michigan specifically designed to protect children against such publications.

On the other hand, the United States Supreme Court has ruled that obscenity is not within the area of constitutionally protected

speech or press. Seeing no difference betweeen the meaning of obscenity given in the American Law Institute's Model Penal Code and that developed in case law, the Court approved the following test of obscenity: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. A dissenting justice objected that the Court was painting with such a broad brush that it might result in the loosening of the tight reins upon the enforcement of obscenity statutes. He likewise said the Court compounds confusion when it superimposes the Model Penal Code's definition: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest," upon the statutory definitions of obscenity in the cases before the Court. To say, he says, that the definition of the Model Penal Code is the same as the ones in the cases before the Court goes contrary to the Code's express rejection of the "deprave and corrupt" and "sexual thought" tests. Other dissenting justices said that the First Amendment forbids making the legality of the publication turn on the purity of thought which a book or tract instills in the mind of the reader.

In still another obscenity case, the United States Supreme Court has upheld a New York statute authorizing an injunction against sale and distribution of written or printed matter found after a trial to be obscene. This sort of statute does not constitute an unconstitutional prior restraint. The post-trial seizure provisions of the statute were also sustained by the Court, which stressed that this is a legal remedy long sanctioned in the history of Anglo-American law.

* * * * *

FEDERAL PREEMPTION

The Court of Appeals for the Second Circuit has affirmed an injunction permanently enjoining a Long Island village from enforcing an ordinance prohibiting air flights over the village at less than 1,000 feet altitude on the ground that Congress has occupied and preempted the field of air traffic legislation for the Federal government. The community lies near the New York International Airport (Idlewild). Regulations of the Civil Aeronautics Board and the Administrator of Civil Aeronautics require airplanes to pass over that community as low as 450 feet under some take-off and landing conditions, so there was a clear conflict between the ordi-

nance and the regulations. The Court said that Congress has power to regulate flights in interstate and foreign commerce and has exercised this power in the Air Commerce Act of 1926, and the Civil Aeronautics Act of 1938 and the regulations thereunder. The field is thus preempted for the Federal government. The argument that the legislation did not authorize control of air space under 1,000 feet altitude was rejected. Similarly rejected was the argument that the regulations constituted an unlawful taking of private property. There was no proof of such low or frequent flights as to amount to the taking of an easement of flight compensable under the Fifth Amendment, such as was found in the case of the commercial chicken farm which was destroyed by low and frequent flights of military aircraft over it. There was likewise no merit, the Court felt, to the contention that the regulations represented an unconstitutional usurpation of legislative power and the legislation itself an unconstitutional grant of legislative power to an administrative agency because the legislation granted power to prescribe " rules as to safe altitudes of flight," and that this was not a sufficiently definitive standard. The Court said this was about the only practical standard Congress could prescribe in this field where there are so many things to consider, e.g., weather, terrain, location of cities and airfields, and the size and weight of airplanes.

* * * * *

PARODIES

The Court of Appeals for the Ninth Circuit has held that " the fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright." *Gas Light*, as a play, was published under copyright in England in 1938. In 1941 it was presented in New York as *Angel Street*. The motion picture from the play was very successful. In 1945, Jack Benny presented a radio burlesque of the drama with permission of M-G-M. He did another parody of it in 1952 on his TV program, but without consent. The trial court found striking and substantial similarities between the original and the parody and granted an injunction against further presentations of the parody. The Court of Appeals rejected the contention that it was permissible under the " fair-use " doctrine, which is normally applied to compilations, list-

ings, directories and digests. No " fair-use " doctrine is applicable to copying the substance of a dramatic work and presenting it with few variations as a burlesque.

* * * * *

LIABILITY INSURANCE

The Supreme Court of Washington split when faced with a situation in which a motorist, admittedly negligent, crossed over the center line of the highway and collided with three separate motorcyclists traveling in the opposite direction about seventy-five feet apart. The majority decided that there was one accident, under the " each-occurrence " and " each-accident " limit of liability in an automobile policy. At one place the policy referred to a limit of liability of " $50,000 each occurrence," and at another it said " each accident $50,000." The insured motorist, facing judgments in excess of $50,000, claimed that he had had three separate accidents. The insurance company contended there was only one, in a declaratory-judgment suit. The Court found that under the policy " accident " and " occurrence " were to be considered synonymous, and went into the question from the point of proximate cause. It ruled that there was but one proximate, uninterrupted and continuing cause which produced all the injuries and damages. Hence, there was but one accident or occurrence. The dissenters preferred to apply the rule that insurance contracts are to be construed favorably to the insured when there is ambiguity, and declared that " each accident " meant each collision rather than the results of one act of negligence.

* * * * *

RELIGION AS ELEMENT OF DAMAGES

The Court of Appeals of New York has split as to whether the trial court, in a libel case, should have permitted the plaintiffs to parade not only their religious affiliations but also their religious activities before the jury. The plaintiffs had claimed that they were libeled by a flyer in a political campaign which linked them with the Communist Party. The Court, since the defendants practically conceded that the plaintiffs were not Communists, affirmed modified verdicts returned by the jury, ruling that calling a person a Communist or charging him with having Communist affiliations is defamatory, and is the basis for an action for libel. The defense of fair comment applies to a publication in a political campaign, but it

is not available here, since the comments were false and contained unjustifiable inferences. The greater problem arose from the fact that the trial judge had permitted the plaintiffs to show that they were members of the Roman Catholic Church and to demonstrate at some length their dedication to and activity in the Church. He did this on the ground that it tended to show the plaintiffs were not Communists, because the Catholic Church's opposition to Communism is well known, but he later remarked that it was also admitted as having a bearing on the damages to be recovered in the suit. The Court of Appeals considered the admission of this testimony as to religious affiliation and activity only in relation to its bearing on the damages awarded, since the defendants admitted at the trial that the plaintiffs were not Communists. The Court of Appeals said that while in all but the rarest cases matters of religious beliefs and observance are inadmissible because they are irrelevant this was that rare case in which proof of the plaintiffs' piety and devotion to the tenets of their religion and of their prominence and activity in their church was competent and pertinent to show the harmful tendency of the defamation and the damages suffered. This rule, while applicable in the instant case to members of the Roman Catholic Church, would be, said the Court, applicable to members of all recognized religious groups, for they are all opposed to Communism. The dissenting judges agreed that the trial judge was right in allowing evidence of church membership, but they felt that " to allow such an extravagant self-spoken display of piety and religious devotion could have no other purpose and effect than to incite the sympathy of the jury in plaintiffs' favor and to give them grounds for inflicting severe monetary punishment on overzealous party members for their careless castigation of their opponents in the closing days of a bitterly fought primary contest."

* * * * *

SEARCH AND SEIZURE

The Court of Appeals for the Eighth Circuit has ruled that a well-wrapped package sent by air mail is a type of mail protected against unreasonable search and seizure under the Fourth Amendment. It cannot be seized and opened without a proper warrant. The defendant, at the trial, moved to suppress the evidence (a six-ounce package containing heroin which she had sent from Kansas City to her husband in Denver by air mail and special delivery, and which

the post office at Kansas City intercepted and opened without a warrant) on the ground that it had been obtained through an unconstitutional search and seizure. The U.S. Supreme Court has said that the protection of the Fourth Amendment extends to one's papers and other effects while in the mails, in the form of " letters and sealed packages," but other matter, such as newspapers and magazines can be opened for inspection without warrant. To the contention of the Government that the package involved in the present case was not entitled to that protection, the Eighth Circuit held that the Government's contention was too narrow. It held that matter upon which first-class postage has been paid qualifies for protection and it further noted that postal regulations require first-class postage on all sealed matter and that 39 U.S.C.A. § 462 provides that " air-mail means ' first-class mail '." Placing first-class postage on mail indicates the sender's intention that it not be opened and inspected at will.

* * * * *

CRIMINAL INSANITY

The Supreme Court of Indiana has refused to abandon the classic right-from-wrong test of criminal insanity in favor of the product-of-mental-disease-or-defect test adopted by the Court of Appeals for the District of Columbia Circuit in the *Durham* case. Indiana follows the *McNaghten* rule that an accused should be acquitted if " at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Indiana has also added to this the " irresistible impulse " test. In the *Durham* case the Court of Appeals for the District of Columbia Circuit declared the test of criminal insanity should be whether the criminal conduct charged was the product or result of a diseased mind. The Indiana court objected to the *Durham* test for two main reasons: (1) the standard in that case, i.e. whether the criminal act was the product of mental disease, was too indefinite to allow a clear instruction to the jury and would leave a juror to make a decision " according to his personal sense of justice "; (2) under such a test the " accused could know the nature and quality of his act, know that it was wrong, have the will power to restrain

his act, and yet by reason of his mental disease, develop egocentric and sadistic tendencies which could produce homicide with criminal impunity." In the particular case, however, which it was considering, the Court reversed the murder conviction because the instructions to the jury had not made clear that the burden is on the prosecution to prove sanity beyond a reasonable doubt when the accused pleads unsoundness of mind, and because, further, the trial court had refused to give the instruction requested by the defendant, recognizing temporary insanity.

* * * * *

CRIMINAL INSANITY

The Court of Appeals for the Ninth Circuit has refused for a second time to discard the right-and-wrong test of criminal insanity in favor of the product-of-mental-disease-or-mental-defect test proposed by the Court of Appeals for the District of Columbia Circuit in the *Durham* case. The *Durham* test accords with the New Hampshire rule and has received considerable favorable comment, but it has not been accepted by other courts. Not only the Ninth Circuit, but also the Fifth Circuit, and the United States Court of Military Appeals, as well as the Supreme Court of Indiana have rejected it. The Ninth Circuit, indeed, stated that so far as the federal judiciary is concerned the question has long since been decided by the U.S. Supreme Court in the two *Davis* cases. The Court went on to explain that the Court of Appeals for the District of Columbia Circuit was able to announce the *Durham* rule in the face of *Davis,* because the courts of the District of Columbia hold a unique status and " are possessed of far greater autonomy in the decision-making process then are courts in other circuits." Further, the consequence of a successful criminal-insanity defense in the District of Columbia is that under the District of Columbia Code the accused is confined to a mental institution for treatment, whereas the consequence in the other circuits is that the accused goes free as a defendant who has been acquitted. Even were it able to do so, however, the Ninth Circuit would not adopt the *Durham* test. The standards therein laid down, particularly the word " product," were, it felt, lacking in sufficient definiteness to be adequate. Finally, a criminal insanity rule must meet its test in the light of the purposes of the criminal law. The " right-and-wrong " test, " has withstood the onslaught of critics, not because it is scientifically perfect, but because the courts

regard it as the best criterion yet articulated for ascertaining criminal responsibility which comports with the moral feelings of the community."

* * * * *

DISPARAGEMENT

The National Labor Relations Board has ruled that an employer need not reinstate strikers who warned the public that the employer's product manufactured during the strike might be inferior. The majority took the position that the truth or falsity of the statements was not relevant; for strikers who deliberately cast discredit on their employer's product or services were simply disloyal. The minority took the position that the handbills which had been distributed were not really an "attack" on the employer's product. Even if they were, their distribution, said the minority, was a protected concerted activity.

* * * * *

SKILL GAMES

The Supreme Court of New Jersey has held that a game in which, to win cigarettes, players risk money on a device having figures or numbers violates the New Jersey antigambling statute, and it makes no difference that skill, and not chance, predominates. The statute in question outlaws, among other things, the playing for money or other valuable thing with any device having one or more figures or numbers thereon. The game in question was not a case of a drawing for prizes as rewards for skill in which there was no staking of money or thing of value by the participants. Further, the reasoning of the act is revealed by the specific enumeration of billiards, pool, tennis, shuffle board, and bowls, games in which all agree skill is the predominant element. Subsequently, the state legislature amended the statute to exempt from the ban games "requiring art or skill." The Governor then announced his intention to veto the bill on the ground the State Constitution precludes legislation approving gambling unless it is authorized by referendum.

THOMAS OWEN MARTIN

Book Reviews

ACTA ET DECRETA PRIMI CONCILII PLENARII INSULARUM PHILIPPINARUM. Typis Pontificiae Universitatis Sancti Thomae, Manilae, 1956. Pp. xlvi- 321-(15).

The first Plenary Council of the Philippine Islands was held in January, 1953. His Eminence Norman Cardinal Gilroy, Archbishop of Sidney, Australia presided as Papal Legate. This Plenary Council is especially important for it called together the Ordinaries of a country largely devastated by war and under years of foreign occupation with the resultant diminishing of discipline both ecclesiastical and civil. The recovery of the Philippine Islands from material devastation is a bright feature of the post-war years and the present Council bids fair to restore ecclesiastical discipline to its former standard.

There are seven hundred and fifty one decrees enacted by this Council. They are introduced by several decrees on the profession of faith and on general norms. Following these is the usual arrangement of decrees on clerics, both in general and in particular, on religious, on sacraments and sacramentals, on sacred places and times, on divine worship, on the teaching authority of the Church and, finally, on ecclesiastical property.

Many of these decrees are restatements of the Code of Canon Law. The Fathers of the Council explain this by stating that the citations are either of more urgent matter or they are further particularization of the general law of the Church (stat. 9). It would take too long to discuss the relative importance and urgency of these citations made from the Code of Canon Law but it can be said that the observations made on the canons cited do establish a better understanding and consequent knowledge of the universal law. Hence, the real contribution toward restoring local discipline in the Philippine Islands is found in these observations. It is too late to recast these observations into definite stautes. They must remain, therefore, as they are found and are to be studied together with the ample citation from the Code of Canon Law.

Some statutes deserve special mention. Only one can be mentioned here. This is the statute which reserves to a Commission of five Bishops the right to interpret authentically the decrees of the Council (stat. 15). This does not in any way interfere with the right of every Ordinary to express declarative interpretations of laws which really need no more than restatements in simpler terms.

Abuses relative to the life of the clergy and in the administration of sacraments are clearly challenged and their practice declared untenable. Some of these abuses may be found in other jurisdictions and some, probably, are only of local practice.

One of the separate statutes commends the Apostolic Nunzio to the special consideration of Bishops, Prelates and priests (stat. 76).

The appendices contain a formula for excardination and incardination and also a questionnaire for the interrogation of parties about to be married. The index will be useful but additional cross references would have contributed to its better use.

IURISPRUDENTIA PONTIFICIA. Damianus Lazzarato. M. D'Auria Editore Pontificio, Napoli (Italia), 1956. Pp. liv-1378.

Officials of diocesan courts are frequently confronted by the problem of trying to assess properly the allegation of fear in relation to the validity of marriage. There are difficulties in a consideration of this kind and any similar case already decided will furnish instructive reading and, possibly, an aid toward arriving at similar conclusions. Fear may reveal itself in different stages and in various degrees so that its correct assessing will be difficult to determine. Hence, a comprehensive knowledge of jurisprudence in this matter will be of incalculable value in the solution of cases before the courts.

The author of this volume is an advocate in the Roman Curia and he has assembled a considerable number of decisions where precisely fear was advanced as a reason for the assertion of invalidity of marriage. No one but he who is exclusively engaged in the work of tribunals could be expected to read and study the thousand and more pages of this book but reference to its divisions and to its index will frequently furnish assistance in separate marriage cases.

One index divides decisions according to fear as exercised by a mother, a father, by both parents of the bride and by the prospec-

tive husband. Another index divides cases according to the reasons upon which fear is based. Such reasons are usually found in the prospective wife but cases are mentioned where fear is alleged on behalf of the man. Physical violence, threats and reverential fear are mentioned as reasons alleged in some marriage cases. The above divisions are carefully put down under the more general division of favorable and non-favorable decisions.

Under the division entitled "principles and arguments", there can be found a rather lengthy discussion of indirect proof of fear. In the same index there is a discussion of imminent danger as productive of fear as well as an outline of just and unjust fear. These notices could be continued indefinitely but the ones mentioned are set down as indications of the value of this book to diocesan tribunals.

Unfortunately, there are a number of typographical errors. They are, however, corrected in a list of two full pages at the end of the book. In addition to the officials of diocesan courts, major students of canonical processes will find this book a welcome volume in their libraries.

L'ÉGLISE CATHOLIQUE EN RÉGIME FRANÇAIS DE SÉPARATION. Abbé Jean Kerleveo. Les Prérogatives du Curé dans son église. Desclée & Cie., Paris, 1956. Pp. xii-398.

This book is one of a series devoted to the study of the condition of the Church during the tenure of the Law of Separation in France. It is well known how the State encroached on the liberty of the Church by the laws of 1905 and 1907.

In this series, the author investigates the various phases of control forced on the Church. The particular object of this book is to study the activities of the pastor during the Law of Separation.

There is no index but the author supplies a very detailed table of contents. Hence, it is possible to find adequate discussions of the rights and obligations of pastors in exercising their ministerial duties. These rights and obligations are well described. They consider duties both in reference to the State and to ecclesiastical Superiors. The difficulties under which pastors labored in these circumstances can easily be understood. No one can read this book without sympathy for pastors who were doing their best under civil restraint.

The footnotes are adequate. They contain many references to contemporary decrees and resolutions. The bibliography is very short. Only a few works are indicated and most of them are articles.

This book is necessary reading for historians of the Church. The period of the Law of Separation is important in the study of Church-State relations. Students, too, of Public Ecclesiastical Law will find this book interesting and helpful in their consideration of the liberties of the Church.

EDWARD ROELKER

Il matrimonio della Repubblica Socialista Federativa Sovietica Russa nella filosofia e nel diritto, Antonio Gregnanin. In Appendice, Codice della famiglia con testi ufficiali russi nella prima versione italiana.—Indice alfabetico delle materie. Presentazione di Mario Matteucci Segretario Generale dell'Istituto Internazionale per l'unificazione del Diritto privato. Casa Editrice Dott.A. Giuffrè, Milano 1956, pp. XXIV-162.

The problems of the juridical state of marriage in the USSR are known in this country from many publications. (I will mention here only one, the eminent study of Prof. V. Gsovski, *Soviet Civil Law,* Ann Arbor, University of Michigan Law School, in two volumes: v.I Comparative Survey 1948; v.II Translation 1949. About marriage especially cf.v.I, pg. 111-151; v.II, pg. 239-290.)

At present we have the separate study on marriage itself and only in the legislation of one of the sixteen Soviet Republics, i.e. of the Russian Republic. The author selected for study only this Republic because it " is the dominant one among the sixteen (Republics) of the Union " and because the " *mens legislatoris* of this country inspires and is the guide for all the others " (pg.xiii). We want to remark that, although it is not the common code for the entire Soviet Union and each of the sixteen component Republics has its proper code, yet the main legislation of all the Republics is inspired not by the Russian Republic, as the author said, but by the *Ukases* (decrees) of the Presidium of the Supreme Soviet of the USSR, which must be included in the code of each Republic. (If we compare e.g. the code of the Ukraine with the code of the Russian Republic we see the differences not only in text of redaction and some-

times in disposition of matter, but also in statements themselves; as in marriage law the code of the Ukraine requires for registration of marriage a woman to be 16 and a man to be 18 years of age; the Russian code requires that both be 18 years of age; but they still agree in accepting the same supreme legislation of the Soviet Union, which constitutes the greatest part of each of these codes.

The author presents the matter under two aspects: ideological and juridical.

In the first part of his book the author strives to collect the main ideological presuppositions of communistic doctrine about the marriage.

According to the ideological conceptions of the historical and dialectical materialism of Marx and Engels " even women are the means of production and reproduction; therefore, on the basis of deterministic economic-demographic plans, a woman, as well as a man, has to produce, wherever the State places her for work; she has to reproduce and use her sexual ' freedoms ' on the basis of a pre-determined discipline " (pg. 6).

" Analogically it is said in regard to the children: . . . the children are of the State, in so far as they must be maintained, instructed and educated for the State and according to directions of the State " (pg. 6).

Also in regard to the foundation of the family and stability of marriage, the communistic doctrine states its perverted principles: " The spouses, free from their natural reciprocal rights and obligations, can live more actively for the exclusive disposition of the socialist State." (pg. 7) The *patria potestas* is abolished. And finally, according to the expression of Engels (*Der Ursprung der Familie, des Privateigentums und des Staats,* pg. 49): " The marriage can be dissolved by the wish of one of the parties " (pg. 8).

The same principles are expressed in the works of Lenin and Stalin (pg. 8-17) with some different details (cf. pg. 79).

With regard to the background of the above mentioned principles, *The Great Soviet Encyclopedia* (v.VII, Mosqua, 1927, col. 324) defines marriage from the ethnological view as: " The living together of two persons male and female, which arises from the basis not only of their reciprocal economic and sexual relationship, but also from the basis of the social order ". According to this definition the principal basis of marriage is not the natural right of the spouses to

their bodies for generation, *the expression of their will of predilection* (the last phrase is the author's), but the economic-instinctive order, with addition of the administrative order (pg. 21).

These ideological concepts do not arise from the conscience of the soviet people, but are imposed on them by force, therefore they can not be called the proper soviet philosophy.

In the second part the author presents soviet marriage from the soviet juridical point of view. There are, especially in regard to the form of marriage, some periods of evolution in the soviet legislation. Until November 19, 1926 even the religious marriage was admitted before the law, but not after this date, when the new code in the RSFSR was adopted (pg. 28). Until 1944 there was admitted juridically also marriage of fact, i.e. performed anywhere either alone or before friends (pg. 31). The main reform came with the *Ukase* of the Presidium of the Supreme Soviet of the USSR July 8, 1944, according to which only registered marriage has legal effects (in regard to all previous marriages of fact their legalization was retroactive). This legislation remains unchanged.

But for the validity of marriage there are three requirements: 1. age of 18 years for both spouses (this only in the RSFSR); 2. their consent, which is considered valid even if it is given by error, violence or deceit; 3. the registration of marriage in the office of records of the acts of civil state (*ZAGS Zapis Aktov Grazhdanskoho Sostoiania*) either with or without witnesses.

Impediments to registration and consequently to the validity of marriage are four in number according to the author, but actually there are only three: 1. the bond of previous marriage; 2. consanguinity in the direct line in all degrees (ancestors and descendants) and between brothers and sisters (both legitimate and natural, even between step-brothers and sisters); 3. debility of mind or insanity, at least of one of the parties, which is recognized by a tribunal according to criteria provided by law (pg. 38-40).

As to *different nationality*, i.e. soviet and non-soviet, introduced as an impediment to the registration of marriage by the decree of the Presidium of the Supreme Soviet of the USSR, April 2, 1947, which the author refers to as still obligatory (in the text pg. 41; in the constitution 6-bis pg. 89), it is to be noted that it was abrogated by the same Presidium, Jan. 21, 1954 (cf. *Kodeks Zakonov o Brake, Semie i Opeke of RSFSR*, Mosqua, 1956, pg. 5).

Next the author in a whole article strives to give the definition of soviet marriage. The author rightly recognizes, that it is difficult to give the juridical definition of the relationship, in which the juridical element is subordinated to political-ideological element (pg. viii and 45).

Among the juridical effects of soviet marriage, there are those which coordinate the relations between the spouses themselves (as the right of each of them to keep his or her own name, occupation, residence and pre-marriage property), and those which coordinate the relations of parents to their children (as the right and obligation to give them their name, citizenship and maintainance; as well as the right to commit them to the care of others). In general this soviet legislation with detailed casuistic prescriptions, as a logical consequence of the ideological conceptions of the communistic doctrine, does not on the whole respect the natural law (pg. 51-68).

But the death-blow to matrimony viewed as a natural institution is the soviet legislation regarding divorce. I disagree with the author, who says that after the *Ukase* (decree) of July 8, 1944 the position of divorce in the Soviet Union is decidedly unfavorable and practically was made almost impossible (pg. 81, n. 8). There are some provisions of law, which only apparently are against divorce. They are really the same as was the original attitude of the communist regime in regard to divorce. As the author shows, divorce was the object of the first legislative acts of the soviet government and was confirmed by all governments, from Lenin to Stalin, from Malenkov to Bulganin (pg. 69). The *Ukase* of July 8, 1944 decided only, "that marriage can be dissolved by the legal way solely and only in those cases in which the tribunal will deem it justifiable" (p. 73), but the *Ukase* gives no statutory grounds for divorce leaving these grounds entirely to the discretion of the court.

The last disposition in this matter is the regulation (*postanovlenie*) of the Plenum of the Supreme Court of the USSR, Jan. 16, 1949, which the author does not refer to, but which is inserted in the last edition we have of the code of the Russian Republic. Here the Plenum of the Supreme Court of the USSR apparently goes much further and seems to state the grounds for divorce, but this statute is so formulated, that the whole decision depends, as before, on the tribunal itself. This disposition merits to be cited: "Tribunals have to consider, that in proceedings for dissolution of marriage

they are obliged to depart from the fundamental principle of the *Ukase* of the Presidium of the Supreme Soviet of the USSR, July 8, 1944, about the consolidation of soviet family and marriage. Tribunals must keep in mind, that a temporary dissonance in a family and conflicts between spouses because of occasional and transitory reasons, as well as the unwillingness of one or both spouses to continue the marriage which is insufficiently proved, cannot be considered as an adequate ground for dissolution of marriage. Only after the tribunal, having considered the specific circumstances of the case, has come to the conclusion that the request for dissolution of the marriage is based upon well founded reasons, and that the further conservation of the marriage will be contrary to the principles of communistic morality and the normal conditions for common life and education of children are no longer possible can the tribunal dissolve the marriage" (*Kodeks Zakonov o Brake, Semie i Opeke of RSFSR,* Mosqua 1956, pg. 81, and *Sbornyk Postanovlenij Plenuma Verkhovnoho Suda USSR,* 1952, pg. 186-190).

This is a characteristic trick of soviet law. Here, if we attentively analyze it, we will see that what at the beginning was stated at the end is denied. For what does it mean that a marriage can be dissolved when its conservation is contrary to the principles of communistic morality? To be consequential, it means that a tribunal can dissolve a marriage in every case, because the soviet morality according to the Fathers of communism, as we saw before, favors freedom of divorce.

Therefore, if *de facto* in the Soviet Union the attempts to get a divorce are infrequent, it is due to the people themselves who, as the author remarks, " are not willing to do anything against the natural law " (p. 78) and no credit can be given to the soviet government.

Despite a not too extensive use of bibliography and despite the difficulties the author had in using sources, the present work constitutes a great contribution to the study of the soviet legislation about marriage. His exhaustive collection of the respective soviet decrees and his precise analysis of them and their clarification by the ideological conceptions of the communistic doctrine, all these points constitute the proper original approach of the author to this problem.

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